United States of America

Congressional Record

PROCEEDINGS AND DEBATES OF THE 117th CONGRESS, FIRST SESSION

Vol. 167 WASHINGTON, TUESDAY, DECEMBER 7, 2021 *No. 211*

Senate

The Senate met at 10 a.m. and was called to order by the Honorable RAPHAEL G. WARNOCK, a Senator from the State of Georgia.

PRAYER

The Chaplain, Dr. Barry C. Black, offered the following prayer:

Let us pray.

O Lord our God, You are robed with honor and majesty. Today, guide our lawmakers in their work, enabling them to be Your messengers of unity and hope. Lord, make them productive servants who live lives that honor You. Remind them that no good is permanently lost.

Lord, give them the wisdom to speak words that lead to life. Guide them away from crooked roads where they might slip and fall, as You strengthen them to seize opportunities that bring peace, hope, and freedom.

And Lord, we continue to praise You for the life and legacy of former Senator Robert Dole.

We pray in Your sovereign Name. Amen.

PLEDGE OF ALLEGIANCE

The Presiding Officer led the Pledge of Allegiance, as follows:

I pledge allegiance to the Flag of the United States of America, and to the Republic for which it stands, one nation under God, indivisible, with liberty and justice for all.

APPOINTMENT OF ACTING PRESIDENT PRO TEMPORE

The PRESIDING OFFICER. The clerk will please read a communication to the Senate from the President pro tempore (Mr. LEAHY).

The senior legislative clerk read the following letter:

U.S. SENATE,
PRESIDENT PRO TEMPORE,
Washington, DC, December 7, 2021.

To the Senate:

Under the provisions of rule I, paragraph 3, of the Standing Rules of the Senate, I hereby appoint the Honorable RAPHAEL G. WARNOCK, a Senator from the State of Georgia, to perform the duties of the Chair.

PATRICK J. LEAHY,
President pro tempore.

Mr. WARNOCK thereupon assumed the Chair as Acting President pro tempore.

RESERVATION OF LEADER TIME

The ACTING PRESIDENT pro tempore. Under the previous order, the leadership time is reserved.

CONCLUSION OF MORNING BUSINESS

The ACTING PRESIDENT pro tempore. Morning business is closed.

EXECUTIVE SESSION

EXECUTIVE CALENDAR

The ACTING PRESIDENT pro tempore. Under the previous order, the Senate will proceed to executive session and resume consideration of the following nomination, which the clerk will report.

The senior assistant legislative clerk read nomination of Jessica Rosenworcel, of Connecticut, to be a Member of the Federal Communications Commission for a term of five years from July 1, 2020. (Reappointment)

RECOGNITION OF THE MAJORITY LEADER

The ACTING PRESIDENT pro tempore. The majority leader is recognized.

DEBT CEILING

Mr. SCHUMER. Mr. President, I want to begin today with a short update on the debt ceiling. Over the past few days, we have made good progress on this issue, and I am optimistic that we will be able to prevent the awful prospect of the U.S. defaulting on its sovereign debt for the first time ever. Nobody wants to see the United States default on its debts.

As Secretary Yellen has warned, a default could eviscerate everything we have done to recover from the COVID crisis. We don't want to see that and I don't believe we will see that and I continue to thank all of my colleagues for cooperating in good faith to preserve the full faith and credit of the United States.

NOMINATION OF JESSICA ROSENWORCEL

Mr. President, on Jessica Rosenworcel, the Senate will vote to confirm a remarkable, highly experienced, and historic nominee: Jessica Rosenworcel to be the Chair of the FCC, the Federal Communications Commission. Ms. Rosenworcel has served as a Commissioner at the FCC for nearly a decade, the past 10 months as Acting Chair.

I believe she will receive great bipartisan support as she becomes the first woman ever confirmed by this Chamber to lead the FCC. Ms. Rosenworcel is exactly the right person for the job in 2021. She has set herself apart as one of the Nation's leading champions for more affordable and accessible internet.

After the FCC repealed net neutrality during the Trump administration, the best thing the Senate can do is confirm someone with a proven record of standing on the side of American consumers.

Ms. Rosenworcel will also step in as Chair at a time when the FCC is carrying out the important task of expanding broadband to millions of Americans who have long been left behind. Ms. Rosenworcel is keenly aware of the immense damage that the digital divide has caused our country. It has shut out rural, urban, and low-income Americans, including far too many women and people of color for whom basic internet access remains unavailable or unaffordable, even as it is a necessity in the 21st century.

Ms. Rosenworcel has long focused on these issues, and I am confident that,

under her leadership, the FCC will make immense progress in addressing these challenges.

Americans don't want to see their internet bills go up and up and up. They don't want to have to drive long distances at late hours just so their kids can finish homework at public libraries. And they want telemedicine to be available so they can be in the best of health.

No. Every American wants and deserves fast, affordable, and reliable internet access directly in their homes. Already this year, as a result of the President's infrastructure bill, we have made tremendous strides in closing the digital divide. We will build on that progress by confirming Ms. Rosenworcel today so that Americans can rest assured that they will have an FCC fighting for them.

BUILD BACK BETTER ACT

Mr. President, on Build Back Better, Senate Democrats continue our work to pass the President's Build Back Better Act before Christmas. Making progress on Build Back Better has been no small task, but sticking to our deadline will be worth it for one simple reason: at its core, Build Back Better is the best shot we have had in decades to help families lower costs, to cut taxes for working and middle-class Americans, and create good paying jobs while fighting the climate crisis.

Economists across the ideological spectrum have said it will not—will not—worsen inflation, something we are seeing happening across the world, not just in the U.S.

Here is something just about every American can appreciate: Build Back Better will make it cheaper for parents to raise their kids. For that alone, it is more than worth the effort. By providing the largest investment in childcare in American history, Build Back Better will make it so the vast majority of families will pay no more than 7 percent of their income on childcare for kids under 6. That single investment could save parents hundreds or even thousands of dollars a year. I think it is a pretty great deal for American families.

It will also help our economy. Everywhere you go you hear about shortages of labor. One of the main reasons is inadequate childcare. We rank way low on the list of developed nations. The United States' provisions for childcare come out near the very bottom. That is something we cannot tolerate anymore. And that is just one item, childcare.

Build Back Better will also provide, for the first time ever, free universal pre-K for millions of American families. By one measure, pre-K can cost parents up to $8,600 a year per child. Under Build Back Better, many parents will pay zero. Think about that: pre-K, for the first time in U.S. history, the greatest expansion of free education that the United States has seen in a century. When we made high schools available to everyone, it made our economy the strongest in the 20th century. We have got to learn that lesson here in the 21st century with pre-K.

Build Back Better, of course, will also extend the child tax credit that Democrats passed under the American Rescue Plan. This simple lifeline—a $300 check in the mail each month for each child—can be a game changer—a game changer—during the winter months, and under Build Back Better, we can make sure this benefit stays in place.

None of this approaches the many other ways that Build Back Better will save Americans money. It will provide the largest investment in affordable housing ever. It could save Americans hundreds—even more—by making prescription drugs, like insulin, cheaper. And it will take necessary and long-overdue steps to fight the climate crisis, which costs our country tens of billions each year every time hurricanes, wildfires, and floods wreak havoc across the country.

Creating jobs, lowering costs, fighting climate change, and keeping more money in people's pockets—these are the things Americans want. These are the things Americans need, and it is what Build Back Better does. We are going to continue working to get these things done before the Christmas holiday.

REMEMBERING GIL HODGES

Finally, Mr. President, I close with a bit of joyful, long-awaited news not only for Mets fans all over the world, but for Brooklynites and those who have ancestry in Brooklyn that have spread across the country.

Sunday night, the National Baseball Hall of Fame announced that, after decades of waiting, Brooklyn's wonderful Gil Hodges—one of the great defensive first basemen of his era, a long-time member of the Brooklyn and Los Angeles Dodgers, and a manager of the Mets presiding over the ''Miracle Mets'' 1969 World Series championship—has finally, finally, earned his place in Cooperstown.

Some of the earliest memories I have are listening and watching the Dodgers with my dad. Gil was an essential figure of that era—a hero of the 1955 World Series, an eight-time All-Star, three-time Golden Glove winner. I think he was the first to win the Golden Glove. He was such an amazing fielder at first base, as well as Greg Gibbons.

And what a nice guy he was. One of the highlights of my life each year was to go trick-or-treating and knock on Gil Hodges' door. Who would come out and give us candy? The great man himself while he was a Brooklyn Dodger. That was an incredible, incredible situation. And so it shows you what a nice guy he was. He is a caring guy.

As much as he was a titan of the game, he was a central part of our Brooklyn family, and we all admired the fact that he lived in Brooklyn, right near all of us. Year after year, from one decade to another, Mets fans have waited for this great player to receive Hall of Fame recognition. The wait is over. Gil is in that hall.

I congratulate Mrs. Hodges and the whole Hodges family for receiving this honor. And I want to congratulate, of course, all the other inductees in the Hall of Fame, among them many history-making, barrier-breaking athletes who have made the sport what it is today.

I yield the floor.

I suggest the absence of a quorum.

The ACTING PRESIDENT pro tempore. The clerk will call the roll.

The senior assistant legislative clerk proceeded to call the roll.

Mr. MCCONNELL. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

RECOGNITION OF THE MINORITY LEADER

The ACTING PRESIDENT pro tempore. The Republican leader is recognized.

BUILD BACK BETTER ACT

Mr. MCCONNELL. Mr. President, the last time Washington Democrats pushed through a huge change that disrupted families' arrangements, it earned President Obama the ''Lie of the Year'' award.

Democrats insisted that if you liked your healthcare plan, you could keep your healthcare plan. It turned out that was totally false. Their reckless government takeover threw many families into chaos.

This year, many of the same Democrats want to write a sequel. They want to ram through a radical, reckless, multitrillion-dollar taxing-and-spending spree between now and Christmas. And a huge part of their bill would completely upend childcare and pre-K as they exist for families all across our country.

If you like your childcare, you can keep your childcare. Well, buckle up, parents. What could possibly go wrong?

The Democrats have written their toddler takeover in ways that would turn families' finances literally upside down and make already expensive childcare even costlier. So let's walk through how they did it.

First, their reckless taxing-and-spending spree would make childcare dramatically more expensive through an avalanche of new mandates, regulations, and micromanagement—the usual Washington, DC, routine.

State and local governments are panicking about the childcare inflation this would cause. Here in the District, as one liberal analyst uncovered, local officials have formally estimated—listen to this—that the per-child daycare cost for a toddler or an infant would jump up $12,000 a year—increase the cost of childcare $12,000 a year; $12,000 more per child per year. President Biden's inflation is coming for daycare.

That is why the other half of their clumsy scheme is to dump subsidies onto some families. They want to borrow and print even more so they can

throw money at the same thing they have just made more expensive.

But here is where the bad idea turns literally into a terrible one. The Democrats wouldn't help families directly. This isn't some simple voucher that families can use as they please. My colleagues have produced an insanely tangled scheme where the truckloads of money go from Washington to State governments, to the childcare centers, one leaky bucket after another.

The problems run deeper than that. Democrats want States to sign up for badly underfunded mandates. That is the effect, because the retirement programs would surely last forever; but, for accounting purposes, Democrats are pretending the money stops after a decade. Many States will not be keen to be socialist guinea pigs.

Then there is the fact that the assistance is doled out in incredibly confusing and uneven ways. The subsidies start and stop with no rhyme or reason.

Listen to what a left-leaning organization, the People's Policy Project, has uncovered. They have found that, in year one, a family that earns $1 over their State median income ''will be eligible for zero subsidies, meaning that they will be on the hook for the entire unsubsidized price,'' which they estimate will now cost ''at least $13,000 per year higher than'' it does right now.

The researcher repeats himself because it is so unbelievable. Here is the quote:

> Having a family income just $1 higher than [your State's median income] would result in you being ineligible for child care subsidies in 2022 even as the unsubsidized price of child care skyrockets due to the wage and other mandates in the Democratic proposal.
>
> This is obviously a perverse outcome and it's not clear whether lawmakers even realize what they are about to do.

This isn't just one technical glitch. It is emblematic of how ill-conceived their whole experiment is. There are 10 problems like this on every single page.

I should add, the families who even get to participate in the mess I've just laid out, they are actually the lucky ones because Democrats want Big Government to pick winners and losers among different families who make different choices.

Many American families make one set of sacrifices so that both parents can work full time. These are the people the Democrats are trying to reward, although their plan fails in practice.

But Americans are allowed to have different aspirations. Some families make different sacrifices to have a parent at home full time. Others prefer flexible middle grounds that involve part-time work plus in-home childcare. The Democrats' toddler takeover wouldn't give any of them a dime—no diversity, no flexibility. Institutional daycare or nothing. In fact, it is worse than nothing, because a family who wants a provider to come to their house part time or wants to participate in a neighborhood nanny share will now be stuck in an inflated market. They will have to bid against the employers the Democrats have blessed and subsidized.

This is the essence of what the Democratic plan would do: Big Government and Big Labor work together to reward some family arrangements and punish others.

Our all-Democrat government is already botching the things that actually are government's job—projecting strength abroad, maintaining energy independence—but they can't even do that right. Just look at the poll numbers. The last thing families need are for Democrats to appoint themselves national daycare czars and then botch that, too.

I haven't even touched on one of the most sinister parts of this whole proposal.

For parents who do use childcare outside the home, faith-based options are incredibly popular. The Bipartisan Policy Center estimates that 53 percent of parents who use center-based care use ones that are linked to faith-based organizations, but the same Democrats who are letting far-left propaganda trickle down from the universities into K–12 schools are now declaring war on faith-based childcare. Washington Democrats want to unleash the woke mob on church daycare. There are at least two parts of their bill that are direct attacks.

First, liberals are trying to chase faith-based providers out of the daycare industry by denying funds to any facility they deem discriminatory. Of course, today's radical left tosses around these kinds of accusations at any remotely traditional institution. Faith-based childcare centers could potentially get their subsidies ripped away if they don't hire who secular bureaucrats want them to hire, set up their facilities the way secular bureaucrats want them set up, or even—listen to this—if they give preference to kids of their own faith. Orthodox Jewish daycare centers could get kicked out if they say Orthodox Jewish families get first dibs. Evangelical centers could get punished by bureaucrats if the families who belong to the church are accommodated first.

This is a joke. The left is trying to weaponize the word ''discrimination'' to push faith-based childcare out of business.

Another part of their bill goes out of its way to deny money for facility upgrades to buildings that are used for ''sectarian instruction or religious worship.'' If a faith-based center leads kids in prayer or teaches them their families' faiths, they don't get the funding that everybody else gets? We see this over and over from the culture warriors. They pretend they are happy to have religious groups in the public square but only if they check their beliefs at the door.

Now, a few years ago, the Supreme Court had to strike down a similar policy that penalized faith-based organizations. A State had tried to deny a church a widely available grant to fix up its playground. The Court took a look at it and struck down the law 7 to 2.

But the political left is right back at it. Just look at which Federal bureaucrat would oversee this giant mess. Well, of course, it is none other than Secretary Becerra, the hard-left culture warrior who got famous by suing the Little Sisters of the Poor for being too Catholic and by suing crisis pregnancy centers for being pro-life. This is the person whom Democrats want to give sweeping new powers over families' private choices? Secretary Becerra gets a giant slush fund to bring President Biden's inflation into childcare and discriminate against people of faith—just one more way Democrats' reckless taxing-and-spending spree would hurt working families.

I suggest the absence of a quorum.

The ACTING PRESIDENT pro tempore. The clerk will call the roll.

The senior assistant legislative clerk proceeded to call the roll.

Mr. MARKEY. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

UNANIMOUS CONSENT REQUESTS

Mr. MARKEY. Mr. President, I rise in support of the nomination of Rufus Gifford to be Chief of Protocol with the rank of Ambassador.

Rufus, a native son of the Commonwealth of Massachusetts, transitioned to a career in public service after a very successful career in the private sector.

In 2013, President Obama nominated Rufus to be U.S. Ambassador to Denmark, and he was unanimously confirmed by the U.S. Senate.

In Copenhagen, Rufus was the headliner in a reality TV show, ''I Am the Ambassador.'' The show's innovative approach to public diplomacy gave Danish viewers, particularly young people, an all-access pass into the life of a U.S. Ambassador and the U.S. diplomatic presence in the country. In a country of just 5 million people, 200,000 Danes tuned in to see how the U.S. Ambassador advanced his country's core interests. One Danish viewer said that ''it is the type of show you would watch with your mother-in-law, and she would say, oh, he is a lovely man, that Rufus Gifford.''

Rufus's effusive personality makes him the perfect choice for this new role as Chief of Protocol. In Copenhagen, Denmark, Rufus opened the Ambassador's residence to thousands of visitors. As Chief of Protocol, he will once again play host to foreign dignitaries at the White House and Blair House. His hand will be the first outstretched to greet a Prime Minister, President, or Monarch at a time when diplomacy is most needed.

Ambassador Gifford was unanimously confirmed by this body in 2013 and was

unanimously reported out of the Senate Foreign Relations Committee 4 months ago. I ask unanimous consent that Ambassador Gifford once again earn the support of the full Senate and be confirmed as Chief of Protocol with the rank of Ambassador.

I ask unanimous consent that the Senate proceed to the consideration of the following nomination: Calendar No. 320, Rufus Gifford, of Massachusetts, to be Chief of Protocol, and to have the rank of Ambassador during his tenure of service; that the nomination be confirmed; that the motion to reconsider be considered made and laid upon the table with no intervening action or debate; that no further motions be in order on the nomination and that the President be immediately notified of the Senate's action.

The ACTING PRESIDENT pro tempore. Is there objection?

Mr. CRUZ. Mr. President.

The ACTING PRESIDENT pro tempore. The Senator from Texas.

Mr. CRUZ. Reserving the right to object, the Senators in this Chamber, including Senator MARKEY, know precisely why I have a hold on this nominee.

Right now, as we speak, hundreds of thousands of Russian troops are amassed on the border of Ukraine waiting to invade. This calamitous foreign policy disaster is Joe Biden's fault. This is the direct consequence of Joe Biden's surrender to Vladimir Putin on Nord Stream 2. What is Nord Stream 2? It is a pipeline being constructed from Russia to Germany to carry natural gas. Putin is building Nord Stream 2. Why? To go around Ukraine because right now Russian gas goes through Ukraine.

Putin didn't just wake up recently and decide to invade Ukraine; he has wanted to invade Ukraine for years. He did so in 2014, but he stopped short of full invasion. Why? Because the Ukrainian energy infrastructure was necessary to get the Russian gas to market. Nord Stream 2 is all about building an alternative avenue to get the Russian gas to Europe, so then the Russian tanks can ride into Ukraine.

We had a bipartisan victory. Indeed, the Senator from Massachusetts supported my bipartisan legislation sanctioning the Nord Stream 2 Pipeline in December of 2019. When President Trump signed that bipartisan legislation into law, Nord Stream 2 was halted that day. Not the next day, not the next week, not the next month—that day, the pipeline shut down. We had won a major, bipartisan foreign policy victory. We had stopped Russia. We had stopped Putin.

That pipeline remained dormant for over a year—a hunk of metal at the bottom of the ocean—until Joe Biden arrived at the White House. Joe Biden was sworn into office on January 20, 2021. Four days later, January 24, Putin began building the pipeline again—4 days later. Why? Because the Biden White House made the decision to waive the sanctions on Nord Stream 2 and to give Vladimir Putin a multibillion-dollar gift for generations to come and in doing so, to set the stage for the invasion of Ukraine by Russia.

When Biden waived sanctions on Nord Stream 2, Ukraine and Poland both said that it was creating a security crisis in Europe, that it was increasing dramatically the chances that Russia would invade Ukraine. This invasion that we are facing the very real prospect of is Joe Biden's fault. But do you know what? It is also the fault of Senate Democrats.

For 2 years, we had bipartisan agreement to stop Nord Stream 2, and we succeeded. When there was a Republican President in office, Donald Trump, I and other Republicans were perfectly willing to hold President Trump to account, to press him to stand up against Nord Stream 2, and he did.

As soon as a Democrat got into the White House, our Democratic colleagues decided that partisan loyalty was more important than national security, that partisan loyalty to the Democratic Party was more important than standing up to Russia, was more important than defending Ukraine. So, suddenly, we have seen the Democrats in this Chamber bending over backward to avoid stopping Nord Stream 2.

I want to be very clear. There is a lot of discussion about Joe Biden having a phone call with Putin today. Well, that phone call is real nice, but it is not going to stop an invasion. I will tell you what will stop an invasion. Joe Biden could stop the invasion today by simply following the law and sanctioning Nord Stream 2.

This body could make a major step today to prevent war in Europe, to prevent Russia from invading Ukraine right now, by doing what Democrats and Republicans had agreed to do, had done together until Biden surrendered to Russia. We can do that by passing legislation that I have pending at the desk that would sanction Nord Stream 2, that would stop the project, which would mean Russia would remain dependent on Ukrainian energy infrastructure. For the same reason Russia didn't continue to invade in 2014, it would stop the invasion. We can do that right now.

Accordingly, as if in legislative session, I ask unanimous consent that the Senate proceed to the immediate consideration of S. 3322, which is at the desk. I further ask that the bill be considered read a third time and passed and that the motion to reconsider be considered made and laid upon the table.

The ACTING PRESIDENT pro tempore. Is there an objection to the modification?

Mr. MARKEY. Reserving the right to object, Senator CRUZ knows that the Democrats have offered the Republicans—offered him a vote on Nord Stream 2 as part of consideration of the National Defense Authorization Act. His own colleagues are the ones who objected to a vote being held on the Nord Stream 2 Pipeline as part of that agreement that was generously offered by the Democrats to the Republicans.

The problem is not on this side; the problem is on the side of the Senator from Texas. Yet he continues to hold up dozens of State Department officials, many of them career officials who should be on their jobs around the world right now.

Ultimately, right now, the onus lies on the Republican side for not having a vote on the subject that the Senator from Texas has raised, the Nord Stream 2 Pipeline; therefore, I object to the motion from the gentleman from Texas.

The ACTING PRESIDENT pro tempore. Objection to the modification is heard.

Is there objection to the original request?

Mr. CRUZ. Mr. President, reserving the right to object, I would note that what we just heard was Democrats in this Chamber objecting to sanctioning Nord Stream 2. It is worth understanding what that means. It means that Senate Democrats prioritize political loyalty to Joe Biden and Kamala Harris more than they do standing up to Vladimir Putin.

A month or two from now, if, God forbid, we see Russian tanks moving into Ukraine, remember this moment where Senate Democrats objected and said: No, we won't sanction the pipeline. We won't save Ukraine. We won't stand up to Russia.

You know, the whole country endured Democrats going on and on and on for 4 years—''Russia, Russia, Russia''—and someone who didn't follow politics closely could be forgiven if they actually believed the rhetoric from the Democrats. But it turns out that by saying ''Russia, Russia, Russia,'' what they really meant was ''We hate Donald Trump'' because when it comes to standing up to Russia, for decades, Democrats had shown weakness and appeasement to the Soviet Union. As soon as Donald Trump was gone, we see Democrats going back to weakness and appeasement to Russia again.

The Russian troops on the Ukrainian border are Joe Biden's fault and they are Senate Democrats' fault for being unwilling to stand up to a President of their own party.

I would note that this particular nominee is a nominee to be the head of protocol at the State Department. It is really bad protocol to drive tanks into somebody else's country.

You want to talk about protocol, how about the protocol of, let's defend American national security interests; let's defend Europe; let's defend our allies; let's stand up to a tyrannical bully named Vladimir Putin. Sadly, Democrats don't want to do that. Accordingly, I object.

The ACTING PRESIDENT pro tempore. The objection is heard.

Mr. MARKEY. I yield back.

The PRESIDING OFFICER (Mr. PADILLA). The Republican whip.

REMEMBERING MARCELLA LEBEAU

Mr. THUNE. Mr. President, before I begin, I want to take just a few minutes to honor two members of the ''greatest generation'' whom we lost recently, Marcella LeBeau and Bob Dole.

Marcella LeBeau died on Sunday, November 21. She was from my home State of South Dakota and a member of the Two Kettle Band of the Cheyenne River Sioux who served in the Army Nurse Corps during World War II, including time on the frontlines treating the wounded at the Battle of the Bulge. She was decorated by both France and Belgium for her service.

After the war, she returned to South Dakota, spending 31 years working for the Indian Health Service, including as Director of Nursing, while raising eight children.

She was a powerful advocate for Native Americans throughout her entire life and was a member of the Cheyenne River Sioux Tribal Council for 4 years and a founding member of the North American Women's Association.

Even in retirement, Marcella continued to advocate for Native Americans and also found time to open a quilting shop with her granddaughter featuring, among other things, the Lakota star quilt, used for honoring and naming ceremonies, memorials, and various life achievements.

Earlier in November, she traveled to Oklahoma to attend the ceremony for her induction into the National Native American Hall of Fame.

REMEMBERING ROBERT J. DOLE

As we know, Bob Dole died on Sunday. Bob served as an officer in the 10th Mountain Division during World War II. Late in the war, he was seriously wounded in action during an attempt to rescue a fellow soldier, and he bore the resulting injuries the rest of his life.

Forced by his wounds to abandon his plans to be a surgeon, he quickly found another way to help his fellow Americans: public service. He was elected to the Kansas House of Representatives in 1950 and never looked back. In 1960, he was elected to the U.S. House of Representatives; and, in 1968, he won election to the U.S. Senate, where he served for 27 years.

He was a Senator's Senator, a master of procedure, and a true legislator whose achievements ranged from Social Security reform to veterans legislation, to the Americans with Disabilities Act.

Even after he ended his long career in public service, Bob continued to serve. He was an important supporter of the World War II Memorial here in Washington, DC, and could often be found there visiting with his fellow veterans who had traveled on Honor Flights.

Marcella and Bob came from different places and different backgrounds and, so far as I know, never crossed paths in this life, but they had in common that abiding commitment to service that characterized so many members of the ''greatest generation.'' Both Bob and Marcella spent their entire lives serving their country and their fellow citizens, and even retirement didn't slow them down.

The ''greatest generation'' was a fixture of American life for many decades, but its members are rapidly slipping away. Fewer than 250,000 of the 16 million Americans who served in World War II are still with us, and that number dwindles every day.

We need to make sure that the passing of the ''greatest generation'' does not mean the passing of the virtues that they modeled for us: humility, patriotism, quiet service, duty, and perseverance.

We need to remember Bob Dole and Marcella LeBeau and the many others like them who, in war and in peace, lived lives of service to our country.

My thoughts and prayers are with Bob and Marcella's families, with Bob's wife Elizabeth and his daughter Robin, and with Marcella's children, grandchildren, great-grandchildren, and great-great-grandchildren.

BUILD BACK BETTER ACT

Mr. President, Democrats continue to work on their reckless tax-and-spending spree—or perhaps I should say their reckless tax-and-spending disaster.

Tax hikes, deficit spending, inflationary spending—it is all there in Democrats' spending package—plus, of course, that tax break for wealthy Americans. Yeah, that is right, a tax break for millionaires. I am talking, of course, about Democrats' expansion of the State and local tax deduction known as the SALT deduction, which would overwhelmingly benefit affluent taxpayers in mainly Democrat-led States and do almost nothing for middle- and lower-income families.

For months and months, Democrats have been going on about the need for the wealthy to pay their fair share of taxes, which is, I find, at the height of irony that the Democrats' current bill contains a substantial tax break for wealthy Americans. I am not surprised that Democrats kept that SALT provision out of the Ways and Means Committee markup in the House of Representatives. After constantly talking about making the wealthy pay their fair share, it is a little awkward to publicly debate your tax break for the wealthy.

Instead, Democrats stuffed the tax break into the reconciliation bill under the subtitle of, of all things, ''social safety net.'' Yes, that is right, social safety net.

Well, who benefits from this particular safety net exactly?

About 94 percent of the tax benefit would go to the top 20 percent of earners. About 70 percent will go to the top 5 percent of earners. And nearly one-third of this tax benefit would go to the top 1 percent of households in this country.

The average tax savings for middle-income households from raising the SALT cap would be 20 bucks—$20. Meanwhile, millionaires would receive an average tax cut of almost $15,000.

Well, I guess the priorities of wealthy Democrat donors in blue States trump Democrats' plans to make wealthy Americans pay their fair share. Not only does the bill contain a tax break for millionaires, this tax break is one of the most expensive parts of the bill. In fact, it is the second most expensive item in the House-passed bill over the next 5 years.

That is right. According to the Committee for a Responsible Federal Budget, only Democrats' childcare and pre-K programs would exceed the cost of raising the SALT cap.

Now, given their rhetoric, you would think that Democrats might have chosen to forgo this tax break for the wealthy and spend the money on one of their other programs that they fund for only part of their bill's 10-year budget window. But no. This tax break is apparently so important to Democrats that they are willing to shortchange some of their other priorities in order to include it.

We have also heard a lot from Democrats about how corporations need to pay their fair share, which, I guess, is whatever Democrats determine it to be. The Democrats' bill does include a corporate minimum tax—except it turns out that it is not really a corporate minimum tax and some corporations won't have to pay the full tax.

Democrats have carved out certain exceptions to the corporate minimum tax, including clean energy tax credits. So if you are a corporation engaged in Democrat-approved activities, you will be able to avoid paying some or all of the corporate minimum tax. If you don't qualify for Democrats' approved carve-outs, on the other hand, you can look forward to paying the full tax bill.

Democrats' hypocrisy might be amusing if this bill weren't so dangerous, but, unfortunately, there is not much to laugh about when it comes to this bill.

Democrats' Build Back Better spending disaster will pour $1.75 trillion in government money into an already overheated economy, which will likely prolong the serious inflation we are currently experiencing.

Democrats' helped create our current inflation situation by flooding the economy with a lot of unnecessary government money earlier this year, and now Democrats are going to pour another $1.75 trillion onto the inflationary fire.

American families are already experiencing the worst inflation in more than 30 years. I don't even want to think about what inflation will look like if Democrats succeed in passing on another $1.75 trillion in spending.

Now, I say $1.75 trillion, but, of course, Democrats only arrived at that number through a series of shell games and budget gimmicks. The real cost of

the Democrats' bill is much, much higher. An honest accounting of the bill puts the number in the range of $4.5 to nearly $5 trillion—$5 trillion. To put that number in perspective, the entire Federal budget for fiscal year 2019 was $4.4 trillion—the entire Federal budget.

Democrats are proposing a major expansion of government, and they are deceiving the American people into thinking that it can be paid for with $1.75 trillion. That is simply not true. Democrats have arrived at that number by putting some of their provisions, from tax measures to new programs, into place for as little as a year. But, of course, Democrats don't have the slightest intention of having those tax measures or new programs expire after a year or 2, or ever.

Take the child allowance. Democrats' legislation would have their child allowance sunset in 1 year—1 year. But, of course, Democrats fully intend for their child allowance to be made permanent. But by only funding the child allowance and other measures for a fraction of their bill's 10-year budget window, they can disguise the true cost of permanently implementing these measures and how much these measures will end up costing the American people.

And, make no mistake, these programs will cost them. Democrats may talk about funding their legislation with taxes on corporations and the wealthy, but ordinary Americans are going to be paying for a major part of the bill. A substantial part of the Democrats' tax increases on business and investment would be passed on to consumers in the form of higher prices or reduced services, and those price hikes will come on top of the inflation that we are already experiencing and the additional inflation we are likely to experience as a result of this bill.

Americans are also likely to pay for this legislation with decreased economic growth and fewer economic opportunities, and they may pay in further tax hikes when Democrats try to extend their programs and need to come up with money to at least partially pay for them.

I am hard pressed to think of anything more irresponsible than Democrats passing this legislation at this time. As I mentioned, inflation is currently at a 30-year high. American families are struggling with high gas prices, high grocery bills, high rent prices, the high price of used cars—and the list goes on. Yet Democrats are planning to pass a bill that is likely to worsen our inflation situation and extend our current inflation crisis even further, not to mention driving up our deficit and worsening our country's fiscal health.

We don't know what government money will be needed down the road. We are emerging from a pandemic that required a lot of unexpected government expenditure, and we don't know what other challenges our country will end up facing in the future. Yet Democrats are planning to keep spending as if there is no tomorrow with absolutely no regard—absolutely no regard—for our current inflation situation or for possible future needs.

It is deeply, deeply irresponsible, and if Democrats succeed in passing their spending spree, the American people will be paying a very steep price for decades to come.

I yield the floor.

The PRESIDING OFFICER. The Senator from Wyoming.

Mr. BARRASSO. Mr. President, I come to the floor to join my friend and colleague from South Dakota to oppose the Democrats' reckless tax-and-spending spree.

There are 18 days left until Christmas. So who is on the Democrats' shopping list this year?

Well, it is the same people who are on the list every year: illegal immigrants, union bosses, professional activists, and the donor class of millionaires.

In the Democrats' reckless tax-and-spending bill, they all get big presents from the government. The rest of America gets more spending, more taxes, more debt, and higher prices as they are already struggling and suffering under the largest, highest inflation in the last 30 years.

Democrats call the bill Build Back Better. For most Americans, it is a break-your-back bill.

In this bill, CHUCK SCHUMER's hometown will get tens of billions of dollars to bail out their public housing authority.

Joe Biden likes to say, if you want to know somebody's values, he says, look at their budget.

Well, let's look at the budget that the Democrats are putting forth, because the second most expensive item in this bill is a tax break for millionaires and billionaires in New York, in New Jersey, in California, and in Chicago.

The cost of that sole component: $275 billion, which will have to be paid by the hard-working men and women in this country.

This is one of the bill's top expenses because it is a top priority for Democrat elites. Under the Democrats' bill, the bottom 60 percent of Americans would get zero of those dollars; $275 billion to the richest of the rich.

In 2016, nearly half of the money went to just four States: California, New York, Illinois, and New Jersey.

Rural States like Wyoming, Alaska, North Dakota, South Dakota, and West Virginia received the lowest amounts of tax relief. Democrats want the people in States like Wyoming and West Virginia to pay for these tax cuts for the millionaires of California and New York.

Under this legislation, low-tax States would essentially subsidize high-tax States. What is this going to do to the high-tax States? Well, it will encourage them to raise State taxes, which is probably another reason that Democrats support it.

Democrats also have lots of Christmas presents in this bill for people who come to this country illegally. The Parliamentarian said Democrats can't pass amnesty for illegal immigrants in a previous version of the bill, but Democrats want illegal amnesty so badly that they are going to try all over again.

Let me remind you: This is a spending bill; it is not an immigration bill. Democrats know that they don't have the votes to pass the immigration bill that they would like to see. Frankly, they know they will never have enough votes in the Senate for an amnesty bill for illegal immigrants. So they are trying to cram it into a spending bill. Democrats are hoping that the American people won't notice.

If Democrats have their way, this spending spree would be the most consequential immigration bill in half a century. The bill would give amnesty to 6½ million people in the country illegally. It would also give them five new entitlements.

The bill includes new permanent welfare programs. There would be no work requirements—not a single one—and no citizenship requirements. This includes free childcare, free preschool, and even free money for college. Now, this is in addition to the $300 check every month for every child Democrats already send to illegal immigrants that they have sent earlier this year.

So it is shaping up to be a long December for American workers and taxpayers, and people know it because we already had the most expensive Thanksgiving ever.

On Friday, we saw one of the most disappointing jobs reports in a disappointing year. The jobs report says we created less than half the number of jobs that the experts predicted we would produce last month. Still, there are almost 4 million fewer Americans working than before the pandemic. At the same time, inflation is only getting worse.

People in all our States are wondering if they are going to be able to afford to have presents under the tree this year; wondering if they can afford a tree at all because, of course, the cost of Christmas trees are up 30 percent—30 percent more this year than last.

More and more Americans find they are heading to shop at the dollar stores. Yet many dollar stores, you have seen in the press, aren't dollar stores anymore. Dollar Tree is selling more and more items for $1.25. Dollar General is opening new stores with a $5-or-less business model. Prices are going up everywhere you look.

One of the reasons for inflation in Joe Biden's economy is the rise in cost of energy. Natural gas is at a 7-year high. Winter is almost here, and prices are up dramatically. The price of gas at the pump is at a 7-year high as well. Yet Biden and the Democrats say everything is fine.

It is just fascinating. Last week, the Democrats' headquarters sent out a

tweet. It was a graph showing gas prices had dropped by 2 cents over a week. The caption was ''Thanks, Joe Biden.'' I actually thought it was a joke. It was serious. They actually said: Hey, good, the price of gas is up $1.25 since he took office, but it dropped 2 cents last week, and let's celebrate the success of Joe Biden.

This is just another example of Democrats' bad math. It is an example also of Democratic leaders who are completely out of touch. Gas is up $1.25 a gallon since Joe Biden took office. A 2-cent drop is hardly enough.

So here is my 2 cents' worth: The American people don't want pennies from Joe Biden; they want a refund from the last election. That is what they deserve. They want affordable, available, reliable American energy.

Joe Biden said last week:

I have used every tool . . . to address price increases.

On the contrary. President Biden has used every tool to drive up prices. He has attacked American energy. He has driven up costs for all Americans. He has shut down the Keystone Pipeline. He is threatening other pipelines. He has blocked oil and gas leases on Federal land. He has threatened to raise taxes on the production of natural gas. We are now producing about 2 million barrels of oil a day less than before the pandemic.

The Secretary of Transportation thinks he has a simple solution to the energy crisis. This is what Pete Buttigieg said. He said it is easy. He said last week that families who buy electric cars ''never have to worry about gas prices again.'' Well, it is simply false. You would think somebody as educated as the Secretary of Transportation would intuitively say: Gas prices affect grocery prices. Gas prices affect retail prices and the price of just about everything else.

Look, even for the Biden administration, this is really out of touch with mainstream America or people who live anywhere outside the bubble of the beltway. People who are struggling with inflation can't afford to go out and buy an electric vehicle. Seniors and families just starting out aren't going to go out and buy an $80,000 electric vehicle.

We know who buys these luxury vehicles. More than 80 percent of the Federal subsidies for electric vehicles go to people making more than $100,000 a year, and, unlike the rest of the people on the roads, these drivers use the roads for free. Yet Democrats make sure to include electric vehicle owners on their shopping list this year.

This bill would give $12,500—$12,500—to couples making up to half a million dollars a year if they buy a luxury electric vehicle. This includes vans, SUVs, and trucks costing up to $80,000. The bill also includes $900 payouts to people who buy electric bicycles.

It has already been a long December for the American people, and we are only at December 7. Yet it must be an exciting time for the Democrats' favorite groups. Democrats have always liked to play Santa Claus, and this year, they have a list of who they consider America's good little boys and girls. Who is on the list? Well, as I said a few minutes ago, it is illegal immigrants, union bosses, professional activists, and the millionaires who live in the penthouses of New York and the mansions of San Francisco and Hollywood. Working-class, Middle America, those families—they are the ones who are going to get stuck with the bill.

I yield the floor.

The PRESIDING OFFICER. The Senator from Arizona.

Mr. KELLY. Mr. President, I ask unanimous consent that I able to complete my remarks prior to the scheduled votes.

The PRESIDING OFFICER. Without objection, it is so ordered.

TRIBUTE TO RON BARBER

Mr. KELLY. Mr. President, today, I rise to honor one of Southern Arizona's own—known to many here as former Congressman Ron Barber—for a long and impactful tenure in public service. Ron has been a pillar of Southern Arizona for decades. He is also a close friend and trusted adviser to both me and Gabby.

Ron has deep roots in Tucson. His dad was stationed at Davis-Monthan Air Force Base when Ron was a teenager. Ron attended Rincon High School and graduated from the University of Arizona. He married his high school sweetheart, Nancy, who is here today, and built his family and his home and his career in Tucson, AZ.

Safe to say, Ron embodies what it means to be a Tucsonan. It is written everywhere, from the art that hangs in his house to the bumper stickers on his car, and there are a lot of them. His love of Tucson is something that rubs off on others—myself included.

I first met Ron at a meeting when Gabby was hiring folks to begin launching her first campaign for Congress. At the time, Ron had just retired from his senior post at the Division of Developmental Disabilities. He had spent decades serving as an advocate for families and vulnerable populations.

For almost anyone, that would be a sufficient career in public service but not for Ron Barber. Ron was moved by Gabby's commitment to serving others. Now, he may not have had any experience in politics, but he showed up ready to help send Gabby to the U.S. Congress. Now, I wondered ''Who is this guy?'' but never really had to wonder again. He believed in her, and he did it early on. That is what makes Ron who he is—always believing, always early. And this is still true today. Really, Ron is literally always early to each and every event that he has staffed me for, and I am pretty sure that is the case with every person he has served alongside.

His punctuality is matched by his generosity and his knowledge of Southern Arizona. That is why when Gabby was elected, she wanted him on her team. He joined as her district director, her eyes and ears back home.

On January 8, 2011, Ron was doing that job when a gunman opened fire at the Congress on Your Corner event. He was standing next to his boss. Gabby was shot in the head. Ron was shot in the face and the leg. Eleven others were injured. Six died. We could have lost him that day too.

Those events rattled the Tucson community that Ron loves so much, and there was so much grief. But in the days, months, and years that followed, we found out just how strong our community was because of people like Ron Barber. Southern Arizona needed Ron, and Ron needed Southern Arizona.

Even through his own injury, he was there for me and Gabby and our family and countless others, as selfless as always. It is that exact selflessness that meant Ron never thought of himself as the right person to run for Gabby's seat after she stepped down.

I remember sitting in a room with Ron and Gabby during her recovery. We were discussing what was next for Gabby and who would run for her seat in the House of Representatives. There was a long list of names that was thrown out, and at the end, Gabby said that it should be Ron. He was sitting right there, and I think he was probably pretty shocked, but, you know, he wasn't exactly in a position to refuse, either. He was reluctant at first but eventually rose at the chance to continue serving the community he loved in a way that he never imagined—in the U.S. Congress—and he did that job with grit and independence.

Ron fought to protect our military installations. He worked on lowering healthcare costs and to get mental health services to Arizonans and Americans across the country. He was a public servant through and through or better yet, a ''citizen legislator''—a term he used to describe his vision for Washington lawmakers.

After leaving Congress, Ron continued finding ways to serve. When Congresswoman ANN KIRKPATRICK was elected to his old seat, Ron went back to work as her district director for nearly 2 years. For Ron, it is never about ego; it is only about helping in whatever way he could and wherever he could.

Then, the day after my election last year, I called Ron and asked him to serve on my transition team.

And then I asked him to join my office as our southern Arizona director, and he signed up for that as well, once again delaying his retirement to go back into public service one more time.

I can't tell you what an asset it has been for our office and for the people of Arizona in that role.

Now, we are going to miss Ron, but we also know that he is not really going anywhere either. While Ron might be retiring from his day job, he will still volunteer his time at several

organizations in Tucson that impact his neighbors in ways that are unique to them and to him. In fact, a couple weeks ago, I saw Gabby trying to sign him up for something. And our southern Arizona community will be better for it.

On top of being an extraordinary leader, Ron is a family man; a supportive and loving husband to Nancy, father to Jenny and Crissi, and grandfather to Kieran, Tillie, Ailsa, Elliot, and Emmy.

And now that he is going to have some more time on his hands, I know that his family is going to be glad to see a lot more of him.

So, Ron, happy retirement to you, but let's make it for real this time. I mean, it is true that you have been saying ''I will retire next year'' for well over a decade now, I think, but I think this time it is going to stick.

But the fact is, you know, we have all really needed you on our teams. It was so important and so critical and it was critical to Gabby and it was critical to the success of my team, and I am sure Congresswoman ANN KIRKPATRICK feels the same.

So on behalf of the State of Arizona and our Nation, thank you, Ron, for your lifetime of hard work and service.

And thank you, Mr. President, for allowing me to dedicate a few words to my friend.

I yield the floor.

VOTE ON ROSENWORCEL NOMINATION

The PRESIDING OFFICER. Under the previous order, the question is, Will the Senate advise and consent to the Rosenworcel nomination?

Ms. ROSEN. Mr. President, I ask for the yeas and nays.

The PRESIDING OFFICER. Is there a sufficient second?

There appears to be a sufficient second.

The clerk will call the roll.

The legislative clerk called the roll.

Mr. DURBIN. I announce that the Senator from New Jersey (Mr. BOOKER) is necessarily absent.

The result was announced—yeas 68, nays 31, as follows:

[Rollcall Vote No. 479 Ex.]

YEAS—68

Baldwin	Grassley	Peters
Bennet	Hassan	Portman
Blackburn	Heinrich	Reed
Blumenthal	Hickenlooper	Romney
Blunt	Hirono	Rosen
Brown	Inhofe	Sanders
Burr	Kaine	Schatz
Cantwell	Kelly	Schumer
Capito	Kennedy	Shaheen
Cardin	King	Sinema
Carper	Klobuchar	Smith
Casey	Leahy	Stabenow
Collins	Luján	Sullivan
Coons	Manchin	Tester
Cornyn	Markey	Van Hollen
Cortez Masto	Menendez	Warner
Duckworth	Merkley	Warnock
Durbin	Moran	Warren
Ernst	Murkowski	Whitehouse
Feinstein	Murphy	Wicker
Fischer	Murray	Wyden
Gillibrand	Ossoff	Young
Graham	Padilla	

NAYS—31

Barrasso	Hoeven	Rubio
Boozman	Hyde-Smith	Sasse
Braun	Johnson	Scott (FL)
Cassidy	Lankford	Scott (SC)
Cotton	Lee	Shelby
Cramer	Lummis	Thune
Crapo	Marshall	Tillis
Cruz	McConnell	Toomey
Daines	Paul	Tuberville
Hagerty	Risch	
Hawley	Rounds	

NOT VOTING—1

Booker

The nomination was confirmed.

The PRESIDING OFFICER (Mr. LUJÁN). Under the previous order, the motion to reconsider will be considered made and laid upon the table and the President will be immediately notified of the Senate's action.

CLOTURE MOTION

The PRESIDING OFFICER. Pursuant to rule XXII, the Chair lays before the Senate the pending cloture motion, which the clerk will state.

The bill clerk read as follows:

CLOTURE MOTION

We, the undersigned Senators, in accordance with the provisions of rule XXII of the Standing Rules of the Senate, do hereby move to bring to a close debate on the nomination of Executive Calendar No. 480, Deirdre Hamilton, of the District of Columbia, to be a Member of the National Mediation Board for a term expiring July 1, 2022.

Charles E. Schumer, Richard Blumenthal, Richard J. Durbin, Angus S. King, Jr., Chris Van Hollen, Elizabeth Warren, Debbie Stabenow, Gary C. Peters, Tammy Baldwin, Tina Smith, Mark R. Warner, Benjamin L. Cardin, Tammy Duckworth, Margaret Wood Hassan, Tim Kaine, Patrick J. Leahy, Jeff Merkley, Sheldon Whitehouse, Jack Reed.

The PRESIDING OFFICER. By unanimous consent, the mandatory quorum call has been waived.

The question is, Is it the sense of the Senate that debate on the nomination of Deirdre Hamilton, of the District of Columbia, to be a Member of the National Mediation Board for a term expiring July 1, 2022, shall be brought to a close?

The yeas and nays are mandatory under the rule.

The clerk will call the roll.

The bill clerk called the roll.

Mr. DURBIN. I announce that the Senator from Illinois (Ms. DUCKWORTH) is necessarily absent.

The yeas and nays resulted—yeas 51, nays 48, as follows:

[Rollcall Vote No. 480 Ex.]

YEAS—51

Baldwin	Feinstein	Markey
Bennet	Gillibrand	Menendez
Blumenthal	Hassan	Merkley
Booker	Heinrich	Murkowski
Brown	Hickenlooper	Murphy
Cantwell	Hirono	Murray
Cardin	Kaine	Ossoff
Carper	Kelly	Padilla
Casey	King	Peters
Collins	Klobuchar	Reed
Coons	Leahy	Rosen
Cortez Masto	Luján	Sanders
Durbin	Manchin	Schatz
Schumer	Stabenow	Warnock
Shaheen	Tester	Warren
Sinema	Van Hollen	Whitehouse
Smith	Warner	Wyden

NAYS—48

Barrasso	Graham	Portman
Blackburn	Grassley	Risch
Blunt	Hagerty	Romney
Boozman	Hawley	Rounds
Braun	Hoeven	Rubio
Burr	Hyde-Smith	Sasse
Capito	Inhofe	Scott (FL)
Cassidy	Johnson	Scott (SC)
Cornyn	Kennedy	Shelby
Cotton	Lankford	Sullivan
Cramer	Lee	Thune
Crapo	Lummis	Tillis
Cruz	Marshall	Toomey
Daines	McConnell	Tuberville
Ernst	Moran	Wicker
Fischer	Paul	Young

NOT VOTING—1

Duckworth

The PRESIDING OFFICER (Ms. SINEMA). On this vote, the yeas are 51, the nays are 48.

The motion is agreed to.

EXECUTIVE CALENDAR

The PRESIDING OFFICER. The clerk will report the nomination.

The bill clerk read the nomination of Deirdre Hamilton, of the District of Columbia, to be a Member of the National Mediation Board for a term expiring July 1, 2022.

RECESS

The PRESIDING OFFICER. Under the previous order, the Senate stands in recess until 2:15 p.m.

Thereupon, the Senate, at 1:03 p.m., recessed until 2:15 p.m. and reassembled when called to order by the Presiding Officer (Ms. SINEMA).

EXECUTIVE CALENDAR—Continued

The PRESIDING OFFICER. The Senator from Delaware.

Mr. CARPER. Madam President, I ask unanimous consent to speak for 2 minutes, if I may.

The PRESIDING OFFICER. Is there objection?

Without objection, it is so ordered.

RECOGNIZING DELAWARE DAY

Mr. CARPER. Madam President, 234 years ago today, the State of Delaware became the first State to ratify the Constitution. For 1 whole week, Delaware was the entire United States of America. And we opened it up, and 49 other States have joined us since then. For the most part, I think it has turned out well.

But the preamble to the Constitution didn't say that we are going to form a perfect union when they adopted it all those years ago. They said, ''in Order to form a more perfect Union . . . ''—acknowledging that we are not perfect, haven't gotten it right, and we may never get it right.

But today, we take a big step—or perhaps we can take a big step towards making our Union a bit closer to perfection.

The Constitution lays out a balance of powers that certain responsibilities fall on the executive branch—the President—and certain responsibilities fall on us; and, of course, the courts have responsibilities of their own.

NOMINATION OF CHRIS MAGNUS

The President has nominated, in this instance, a fellow named Chris Magnus. He has nominated him to serve as the Commissioner of Customs and Border Protection, a very big and important job, as the Presiding Officer knows.

I always like to say that leadership may be the most important ingredient for success of any organization I have ever seen. Inside of government or outside of government, it is the single most important ingredient.

Chief Chris Magnus has over 40 years of exemplary public service in communities that span across this country. He has a strong track record of collaborative leadership, and his nomination has earned the support of dozens and dozens of law enforcement and public safety organizations.

It has been 8 months—8 months have passed since our President nominated Chief Magnus for this critically important role at the Department. The American people are counting on seasoned leadership at the Agency. We have the opportunity today to confirm this nomination and provide the leadership that is badly needed on the borders—especially on the borders of our Nation.

NATIONAL PEARL HARBOR REMEMBRANCE DAY

Madam President, the last thing I would say is this is also Pearl Harbor Day. It is a day for us to remember those who lost their lives, sacrificed their lives standing up for us all those years ago, on December 7, 1941.

With that, I yield the floor.

VOTE ON HAMILTON NOMINATION

The PRESIDING OFFICER. Under the previous order, the question is, Will the Senate advise and consent to the Hamilton nomination?

Mr. CARPER. I ask for the yeas and nays.

The PRESIDING OFFICER. Is there a sufficient second?

There appears to be a sufficient second.

The clerk will call the roll.

The senior assistant legislative clerk called the roll.

The result was announced—yeas 52, nays 48, as follows:

[Rollcall Vote No. 481 Ex.]

YEAS—52

Baldwin	Gillibrand	Murkowski
Bennet	Hassan	Murphy
Blumenthal	Heinrich	Murray
Booker	Hickenlooper	Ossoff
Brown	Hirono	Padilla
Cantwell	Kaine	Peters
Cardin	Kelly	Reed
Carper	King	Rosen
Casey	Klobuchar	Sanders
Collins	Leahy	Schatz
Coons	Luján	Schumer
Cortez Masto	Manchin	Shaheen
Duckworth	Markey	Sinema
Durbin	Menendez	Smith
Feinstein	Merkley	Stabenow
Tester	Warnock	Wyden
Van Hollen	Warren	
Warner	Whitehouse	

NAYS—48

Barrasso	Graham	Portman
Blackburn	Grassley	Risch
Blunt	Hagerty	Romney
Boozman	Hawley	Rounds
Braun	Hoeven	Rubio
Burr	Hyde-Smith	Sasse
Capito	Inhofe	Scott (FL)
Cassidy	Johnson	Scott (SC)
Cornyn	Kennedy	Shelby
Cotton	Lankford	Sullivan
Cramer	Lee	Thune
Crapo	Lummis	Tillis
Cruz	Marshall	Toomey
Daines	McConnell	Tuberville
Ernst	Moran	Wicker
Fischer	Paul	Young

The nomination was confirmed.

The PRESIDING OFFICER. Under the previous order, the motion to reconsider is considered made and laid upon the table. The President will be immediately notified of the Senate's action.

CLOTURE MOTION

The PRESIDING OFFICER. Pursuant to rule XXII, the Chair lays before the Senate the pending cloture motion, which the clerk will state.

The senior assistant legislative clerk read as follows:

CLOTURE MOTION

We, the undersigned Senators, in accordance with the provisions of rule XXII of the Standing Rules of the Senate, do hereby move to bring to a close debate on the nomination of Executive Calendar No. 513, Chris Magnus, of Arizona, to be Commissioner of U.S. Customs and Border Protection, Department of Homeland Security.

Charles E. Schumer, Richard Blumenthal, Richard J. Durbin, Angus S. King, Jr., Chris Van Hollen, Elizabeth Warren, Debbie Stabenow, Gary C. Peters, Tammy Baldwin, Maria Cantwell, Mark R. Warner, Benjamin L. Cardin, Tammy Duckworth, Tina Smith, Margaret Wood Hassan, Tim Kaine, Patty Murray.

The PRESIDING OFFICER. By unanimous consent, the mandatory quorum call has been waived.

The question is, Is it the sense of the Senate that debate on the nomination of Chris Magnus, of Arizona, to be Commissioner of U.S. Customs and Border Protection, Department of Homeland Security, shall be brought to a close?

The yeas and nays are mandatory under the rule.

The clerk will call the roll.

The senior assistant legislative clerk called the roll.

Mr. THUNE. The following Senator is necessarily absent: the Senator from Oklahoma (Mr. LANKFORD).

The yeas and nays resulted—yeas 52, nays 47, as follows:

[Rollcall Vote No. 482 Ex.]

YEAS—52

Baldwin	Cardin	Cortez Masto
Bennet	Carper	Duckworth
Blumenthal	Casey	Durbin
Booker	Cassidy	Feinstein
Brown	Collins	Gillibrand
Cantwell	Coons	Hassan
Heinrich	Merkley	Sinema
Hickenlooper	Murphy	Smith
Hirono	Murray	Stabenow
Kaine	Ossoff	Tester
Kelly	Padilla	Van Hollen
King	Peters	Warner
Klobuchar	Reed	Warnock
Leahy	Rosen	Warren
Luján	Sanders	Whitehouse
Manchin	Schatz	Wyden
Markey	Schumer	
Menendez	Shaheen	

NAYS—47

Barrasso	Grassley	Risch
Blackburn	Hagerty	Romney
Blunt	Hawley	Rounds
Boozman	Hoeven	Rubio
Braun	Hyde-Smith	Sasse
Burr	Inhofe	Scott (FL)
Capito	Johnson	Scott (SC)
Cornyn	Kennedy	Shelby
Cotton	Lee	Sullivan
Cramer	Lummis	Thune
Crapo	Marshall	Tillis
Cruz	McConnell	Toomey
Daines	Moran	Tuberville
Ernst	Murkowski	Wicker
Fischer	Paul	Young
Graham	Portman	

NOT VOTING—1

Lankford

The PRESIDING OFFICER. On this vote, the yeas are 52, the nays are 47.

The motion is agreed to.

EXECUTIVE CALENDAR

The PRESIDING OFFICER. The clerk will report the nomination.

The senior assistant legislative clerk read the nomination of Chris Magnus, of Arizona, to be Commissioner of U.S. Customs and Border Protection, Department of Homeland Security.

The PRESIDING OFFICER. The Senator from Iowa.

REMEMBERING MIKE GARBO

Mr. GRASSLEY. Madam President, I come to the floor today to discuss what anybody ought to discuss with a heavy heart because when it comes to fighting drug abuse, the United States seems to be losing.

Over 100,000 Americans have died from drug overdoses in the last year alone. These casualties could have been prevented by better drug prevention, treatment, and intervention, but the brunt of this epidemic is due to drug trafficking organizations. Cartels fuel the flames of drug abuse, often using violence and causing devastating loss of life.

Drug traffickers lace street drugs with fentanyl, making deadly drugs even more lethal. And, of course, we all know that most or all of that fentanyl comes from China. China is winning a war, killing Americans through drug overuse, without even firing a shot.

Of course, drug traffickers are not slowing down. In June of this year alone, Customs and Border Protection agents seized over 1,000 pounds of fentanyl. This could kill two-thirds of the population of the United States.

The boots-on-the-ground agents seize these drugs before they reach us, but what they find, what they seize, is a fraction of what comes into the United States. In my home State of Iowa, agents from the Drug Enforcement Administration seized more lethal doses

of fentanyl in 2020 than there were people within the State. This means the Drug Enforcement Administration seized enough fentanyl to kill everyone in Iowa.

Our law enforcement officers are critical to the fight against illicit drugs.

Now, listen. In the last year or two, law enforcement has been subject to terrible abuse, but these brave men and women don't do just great things; they also do good—good for our country and good in protecting our people. The brave members of State and local law enforcement—you know, like the police, like the sheriffs, like the correctional officers, as well as our Federal officers—deserve honor and respect. They put their lives on the line to ensure that we are all safe.

When tragedy strikes, we feel the loss of our fiercest defenders. In fact, according to the FBI, the rate of officers killed in the line of duty is up. As of last month, 59 members of law enforcement were killed in 2021. At this point in 2020, the number was 39, and that was still an uptick from years prior. This trend is a grim reminder of the bravery, the courage, and the valor each law enforcement officer has when they go to work.

DEA Agent Mike Garbo was one of our most recent casualties in the fight against the illicit drug trade. He was conducting a routine check on an Amtrak train in Arizona when two drug traffickers ambushed him and his fellow DEA agents with gunfire, and of course Agent Garbo was killed.

Agent Garbo was a committed law enforcement person, committed to a career of public service generally and law enforcement specifically. He served as a police officer in Nashville for nearly 12 years before he joined the Drug Enforcement Administration. He served the DEA honorably for more than 16 years, combating drug traffickers all over the globe, from our southwest border all the way to Afghanistan.

This tragedy reminds us in Washington, here, that our work to stop the flow of illicit drugs and to combat drug-related crime isn't over. I support being tough on deadly drugs like fentanyl substances by pushing for permanently scheduling all fentanyl analogs, and I am leading a bipartisan effort to proactively control synthetic analogs and address the heightened threats of methamphetamine.

Being pro-active in the fight against illicit, deadly drugs is critical for multiple reasons.

First, we want to make sure it is harder for drug traffickers to bring drugs into our Nation and to fuel the addiction crisis, but we also need to make it harder for drug traffickers to feel emboldened in lawlessness and to kill law enforcement people like Mike Garbo.

It is time for us to stop sharing stories about tragedies, and, instead, we need to rewrite the story of our future as a nation. I urge my colleagues to act for the betterment of all Americans and join me in the fight against the illicit drug trade, particularly the scheduling of fentanyl and its analogs.

Most importantly, we must all—and I do—thank Agent Garbo and his family for putting his life on the line to protect his fellow countrymen. His sacrifice is, sadly, much too common, but it doesn't make it any less powerful and tragic. We will continue to honor this man and those who follow in his footsteps as we fight the spread of illicit, deadly drugs.

PRIVATE DEBT COLLECTION PROGRAM

Madam President, now on another matter, I want to refer to the debate that is going on behind the scenes here as Democrats try to put together a bill that they would call the Build Back Better bill. I call it the Blue State Billionaire Bailout. It comes from that part that they are talking about increasing all of the IRS agents by a massive amount of people to supposedly bring in x number more dollars into the Federal Treasury. There is some debate about how much it will bring in.

But I want to talk about a program that hires more agents, pays for more agents, and brings in more money, and that is the Private Debt Collection Program.

Going back to what is being talked about here in the Senate behind closed doors in the Democratic Party to put this Blue State Billionaire Bailout bill together, I go to December 1, Washington Post, Secretary of Treasury Janet Yellen. The Post gave her two Pinocchios for claiming that the bloated Blue State Billionaire Bailout package is fully paid for, or, as she would say, the Build Back Better bill is fully paid for.

Much of the Post's column focuses on how much revenue Democrats' proposed increase in the IRS enforcement budget would generate. The White House and the Congressional Budget Office have offered wildly, wildly different estimates of what that proposal would do. The estimate provided by CBO—that is Congress's official scorekeeper—is hundreds of billions less than the number provided by the White House.

I am noting this disagreement to highlight an existing program that is bringing in additional revenue without Congress spending 1 dollar more. I am speaking about, as I previously said, the Private Debt Collection Program.

Recently, the IRS provided an update of this program's enforcement and performance for fiscal year 2021. It shows the program is thriving and bringing in more and more revenue on an annual basis.

Maybe I should give a personal comment on why this program is important to me, because I think I was chairman of the Finance Committee—I forget whether it was 2003 through 2006—during that period of time that we set this program up.

This update on the latest statistics shows that this program, the Private Debt Collection Program, resulted in net revenue to the Treasury of more than $1 billion in fiscal year 2021. This is a real increase of around 129 percent over net revenue in fiscal year 2020 of around $459 million. That 2020 increase was on top of a more than 100 percent increase in net revenue over the year 2019.

These numbers show that the longer the Private Debt Collection Program operates, the more it recovers to the Federal Treasury. The incredible numbers of fiscal year 2021 also reflect several months where the IRS did not provide new cases to the private debt collection company, and without cases being given to these private debt collectors, you aren't going to get more revenue.

In a previous speech, I said that I was going to hold the IRS Commissioner responsible to his promise to provide additional cases to the collection companies by September 27.

And, by the way, I also ought to make very clear that this Private Debt Collection program only goes after taxpayers that aren't paying and that the IRS has given up on collecting money from.

So Commissioner Rettig has kept his promise. I understand that additional collection cases were provided. I commend Commissioner Rettig for following through on his promise to me and for his continued support of this very worthwhile program.

The Private Debt Collection program also does more than just bring in revenue into the Treasury. It also pays for the IRS to hire special compliance personnel who collect unpaid debts that are owed to the government. Those amounts are reflected in the total fiscal year numbers that I gave earlier. I understand that the program was also so successful that the IRS can now hire with this additional revenue up to 400 more employees.

Right now, the Senate is wrangling over how much revenue might be collected if you increase the budget of the IRS and hire thousands of additional IRS personnel. So, meanwhile, as I have shown, we currently have a program that is already bringing in more money year over year, while paying for additional IRS personnel.

I appreciate Commissioner Rettig's support of this program, and look forward to reporting to my colleagues on his continued success.

I yield the floor.

I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The bill clerk proceeded to call the roll.

Mr. CORNYN. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER (Mr. MURPHY). Without objection, it is so ordered.

The Senator from Texas.

BUSINESS BEFORE THE SENATE

Mr. CORNYN. Mr. President, we are nearing the halfway point of the 117th Congress, and it is time to look back and see what our Democratic colleagues now in the majority have accomplished.

Unfortunately, we have seen a lot of wasted valuable time and ignoring of critical tasks and failing to meet some of the most basic requirements of government. Our colleagues used the first few months of the year to ram through a partisan $2 trillion spending bill, and then they wasted the summer on the majority leader's designed-to-fail agenda.

It wasn't about actually getting anything done. It was about messaging. And then they threw it in cruise control this fall, refusing to let the Senate vote on anything other than low-level nominees and, again, those messaging bills.

Well, unsurprisingly, this partisan approach to governing—despite the fact that we have an evenly divided Senate and perhaps an evenly divided government, this partisan approach, unsurprisingly, did not lead to any good results.

One of the biggest unforced errors in this tardiness so far has been the national defense authorization bill. Now, I happen to believe that providing for the common defense and supporting our men and women in the military, keeping the American people safe, protecting our freedoms is the most important work that we do here. And, indeed, that is reflected by the fact that the National Defense Authorization Act has been passed for 60 years, I believe it is—60 consecutive years.

Well, this is not a particularly controversial bill. In fact, it came out of the Armed Services Committee with an impressive 23-to-3 vote. You have to look long and hard to find any bill that passes the Senate that enjoys as much bipartisan support.

For some unknown reason, though, the Democratic leader refused to bring the Defense authorization bill to the floor. But then when he finally did, after it had been sitting around waiting for action for literally months, then he attached a controversial provision—a bill, the so-called Endless Frontiers Act, which had not been processed by the House, but in an attempt to force the House to take that bill.

Well, as it turned out, after broad bipartisan support for the Defense authorization bill, he couldn't get the votes here in the Senate to advance that bill, so he had to basically pull it down. Well, when you try to add something as big as the Endless Frontiers bill that did pass the Senate to a bipartisan Defense appropriations bill, that created a lot of problems.

So you can't sit on a bill for months and then at the last moment try to jam another bill onto it without at least giving people an opportunity for a robust debate and amendment process. And, as we know, during the time that I have been here, and I am sure during the time that the Presiding Officer has been here, we have less and less of that robust debate and less and less of actually offering and voting on amendments on the Senate floor. It is very different from the time I came here, when it was commonplace.

So I am disappointed that it has taken the leader this long to bring the NDAA to the floor and that, so far, we have been thwarted in our attempt to get this bipartisan bill done. I hear rumors that, in fact, there may be a bill being preconferenced with the House. So my hope is we will get a chance to vote on this bill in the coming days.

Of course, as I indicated, this legislation sends critical support to our servicemembers and their families and ensures that our military bases in Texas, Connecticut, and elsewhere have the funding they need to support the missions they serve in around the world.

But it also provides the military the means to take stock in the global threat landscape. Since 9/11, we have been very focused on the terrorism threat. Unfortunately, at the same time, we have seen China and Russia continue to assert themselves more aggressively around the world. So now we are in the so-called ''great powers competition'' once again, and it is critical that we have this tool known as deterrence that only comes through strength.

Passing this bill and providing the resources and authorities needed for our military are essential to providing that strength, which will lead, hopefully, to deterrence and greater peace.

So the NDAA, as I said, is one of the most important assignments that we have, and there is simply no excuse for leaving this in the cleanup pile to be done between now and Christmas. But having said that, I hope we do get it done.

As I said, there are other past-due assignments—something as basic as funding the functions of the government through passing 12 separate appropriations bills that go through a committee process and are open to amendment in the committee.

Congress's deadline to pass the funding bills doesn't pop up out of nowhere. It hits the same day every year. Back in September, when the Senate should have passed a group of those appropriation bills to fund the government for the next fiscal year, our colleagues on the other side, led by the Democratic leader, kicked the can down the road for 2 months. Rather than use that time to play catch-up and pass those annual appropriations bills, they simply lollygagged.

The funding deadline came last week, and what happened?

Well, there was another continuing resolution. They kicked the can down the road yet once again.

This year, our colleagues have found the time to vote on partisan, dead-on-arrival messaging bills, but they have yet to bring a single appropriations bill to the floor for a vote. We will see if that changes before February, when the current continuing resolution runs out.

Then there is another assignment that our colleagues have ignored for months, and that is the debt ceiling. While they are more than happy to spend money like they did at the first part of this year—another $2 trillion—and add to the national debt and plan to spend at least another—anywhere from probably close to $4.5 trillion additional more money on the Build Back Better program—I know it has been advertised as $1.7 trillion, but outside entities like the Wharton business school at the University of Pennsylvania have said that if you ignore the stops and starts that are set up in the bill as gimmicks that make it scoreless and if you actually extend the bill for the full 10-year budget window, it really is spending closer to $4.8 trillion.

We are trying to get the Congressional Budget Office and the Joint Committee on Taxation to give us a realistic score. But if you see this $2 trillion spent at the beginning of the year with another anticipated potential up to 4.5, 4.8, $5 trillion, you can see why raising the debt limit is so critical. The Treasury Secretary said that we will hit the debt limit by December 15, just a week from tomorrow.

Again, this crisis did not just pop up out of nowhere. Since July, the Republican leader has told our friends across the aisle that they need to raise the debt ceiling on their own.

Some have asked: Why do we insist that Democrats raise the debt ceiling on their own when ordinarily this is a bipartisan effort?

Well, part of this is just a necessary political accountability. If our colleagues are going to spend trillions of dollars in borrowed money and add to the debt ceiling, at some point there has to be some transparency and electoral accountability.

I am told now that Senator SCHUMER and Senator MCCONNELL have agreed on a process that will allow our Democratic colleagues to fulfill their responsibilities to raise the debt ceiling on their own and to suffer the accountability that goes along with it.

All along there was a clear roadmap that could have avoided this confusion if our colleagues had simply used the budget reconciliation process. Debt ceilings are routinely raised using the reconciliation process. There is no problem with the Byrd bath or any other concerns. It is something that is written into the Budget Act of 1974 that they could have done on their own earlier, but by delaying here to the last minute, when Secretary Yellen says we are going to hit the debt ceiling here by the 15th of December, they have created another crisis—again, of their own making.

The reason our colleagues have essentially failed at the fundamentals of governing over this last year is that they have been distracted by their own

partisan ambitions. Again, you would think, after the election of 2020—when you have an evenly divided Senate wherein the Vice President is the one who breaks ties and actually determines, because of that, who is in the majority and who is in the minority—that it would council up some bipartisan consensus-making when the Senate is split, essentially, evenly.

Instead, we have seen one of the most aggressive, radical agendas that we have seen since I have been in the Senate, and not surprisingly, our Democratic colleagues have had trouble convincing even Members of their own caucus to go along with it.

The Build Back Better program—or what I would call ''Build Back Bankrupt''—is a bill that gives millionaires and billionaires massive tax breaks. Strangely, from the party that claims to be representing the working class and the middle class of the country, they want to prioritize the tax breaks for millionaires and billionaires while forcing middle-class families, who can't afford to buy expensive electric cars, to subsidize these fancy cars driven by others who can afford them.

Our colleagues say the spending spree will cost taxpayers about $2 trillion, which, of course, is hardly a bargain to begin with. I remember when a billion dollars used to be a lot of money around here, and now trillions of dollars are casually tossed around like it is an insignificant—or not as serious—a matter as it is.

Yet we know the spending spree—as I said, the ''Build Back Bankrupt'' or ''Build Back Broke,'' whatever you want to call it, or ''Build Back Bad,'' and there are other names you can give it—could cost as much as $5 trillion, as I said, which is more than 2½ times what has been advertised.

We started at $6 trillion from the chairman of the Budget Committee, Senator SANDERS. Then it was paired down, supposedly, to $3.5 trillion, and then to $1.75 trillion. The only way that was done was to propose a piece of legislation that was chock-full of gimmicks and cliffs and phony, false starts in programs that will, in all likelihood, be continued should our Democratic colleagues stay in the majority or achieve a true majority.

This multitrillion-dollar bill will drive up energy costs. We have already seen inflation eating away at the income of working families. When you go fill up your gas tank at the gas station or when you sit down to Thanksgiving dinner, everything is more expensive now because of inflation, making it even tougher for Texas families, among others, to make ends meet.

Of course, then, there is the President's falsely representing the cost of this piece of legislation—actually having the temerity to say that this costs zero. I don't know what he takes the American people for, but they are not stupid. They understand that, when somebody stands up there and says we are going to do something that has been scored to the trillions of dollars and that it is going to cost zero, it really is an insult to their intelligence.

For the past several months, our colleagues have devoted almost all of their energy to this ''Build Back Bankrupt'' plan and, of course, in the process, have failed to meet any of the most basic responsibilities of governing. Now that it is finals season and we are running out of time before the Christmas holidays, they are trying to salvage their poor performance of accomplishment this year.

Our colleagues are quick to point the finger and blame Republicans for the Senate's failures, but Republicans aren't the ones setting the schedule, and, frankly, the message being sent from the Democratic side of the aisle is: We don't want to work with Republicans; we want to do this all by ourselves.

If they get the votes, they can, but they are having some difficulties now—particularly on the ''Build Back Broke'' plan—of even getting Democrats to vote for it. I, actually, think our colleagues from West Virginia and Arizona are doing some of their Democratic colleagues a favor because, I dare say, there are other Members of the Democratic caucus who are going to be on the ballot in 2022, who would prefer not to vote on some of these very controversial provisions.

Our colleagues, though, do control the Senate, the House, and the White House, and every aspect of the legislative process is under their control. So they bear responsibility for the delay in the Defense authorization bill; they bear responsibility for not passing regular appropriations; and they bear responsibility for the concerns that have been expressed by reaching the debt limit, as Secretary Yellen has said, and then, finally, by trying to pass through the House this reckless tax-and-spending spree bill—Build Back Better, ''Build Back Broke,'' ''Build Back Bankrupt''—by focusing so much on these pieces of legislation that will, in my estimation, never pass or certainly not in their current forms.

In ignoring their other basic responsibilities of governing, they are the ones who, ultimately, will get this report card for their performance during the first year of their majority.

So, in being presented with this reality of an evenly split Congress, our colleagues can make a choice as to whether to try to work together and build consensus and do things that can actually pass or to continue down this pathway of purely partisan attempts to legislate. The choice is theirs.

I yield the floor.

The PRESIDING OFFICER. The Senator from Michigan.

UNANIMOUS CONSENT REQUESTS—EXECUTIVE CALENDAR

Mr. PETERS. Mr. President, I rise today to urge my colleagues to confirm several highly qualified nominees who are waiting to get to work in critical roles across the government.

Therefore, I ask unanimous consent that the Senate consider the following nomination: Executive Calendar No. 404, Rupa Ranga Puttagunta, of the District of Columbia, to be Associate Judge of the Superior Court of the District of Columbia for the term of fifteen years; that the nomination be confirmed; that the motion to reconsider be considered made and laid upon the table with no intervening action or debate; that no further motions be in order on the nomination; and that the President be immediately notified of the Senate's action.

The PRESIDING OFFICER. Is there objection?

The Senator from Florida.

Mr. SCOTT of Florida. Mr. President, in reserving the right to object, throughout his Presidency, Joe Biden and his administration have shown a complete and total inability to place qualified and competent people in positions of power across the Federal Government. We have had crisis after crisis due to the failed leadership of President Biden and his appointees. I have absolutely no faith that Joe Biden's radical, far-left nominees will uphold the rule of law.

I cannot and will not consent to allowing these nominees to move forward in an expedited manner. We should take a vote so every Senator can get on the record with their support or opposition to each of these nominees.

Therefore, I object.

The PRESIDING OFFICER. Objection is heard.

The Senator from Michigan.

Mr. PETERS. Mr. President, I ask unanimous consent that it be in order to make the same request with respect to Executive Calendar No. 406, Kenia Seoane Lopez, of the District of Columbia, to be an Associate Judge of the Superior Court of the District of Columbia for the term of fifteen years.

The PRESIDING OFFICER. Is there objection?

The Senator from Florida.

Mr. SCOTT of Florida. Mr. President, I object.

The PRESIDING OFFICER. Objection is heard.

The Senator from Michigan.

Mr. PETERS. Mr. President, I ask unanimous consent that it be in order to make the same request with respect to Executive Calendar No. 410, Sean C. Staples, of the District of Columbia, to be an Associate Judge of the Superior Court of the District of Columbia for the term of fifteen years.

The PRESIDING OFFICER. Is there objection?

Mr. SCOTT of Florida. Mr. President, I object.

The PRESIDING OFFICER. Objection is heard.

The Senator from Michigan.

Mr. PETERS. Mr. President, I ask unanimous consent that it be in order to make the same request with respect to Executive Calendar No. 556, Ebony M. Scott, of the District of Columbia, to be an Associate Judge of the Superior Court of the District of Columbia for the term of fifteen years.

The PRESIDING OFFICER. Is there objection?

The Senator from Florida.

Mr. SCOTT of Florida. Mr. President, I object.

The PRESIDING OFFICER. Objection is heard.

The Senator from Michigan.

Mr. PETERS. Mr. President, I ask unanimous consent that it be in order to make the same request with respect to Executive Calendar No. 557, Donald Walker Tunnage, of the District of Columbia, to be an Associate Judge of the Superior Court of the District of Columbia for a term of fifteen years.

The PRESIDING OFFICER. Is there objection?

Mr. SCOTT of Florida. Mr. President.

The PRESIDING OFFICER. The Senator from Florida.

Mr. SCOTT of Florida. I object.

The PRESIDING OFFICER. Objection is heard.

Mr. PETERS. Mr. President.

The PRESIDING OFFICER. The Senator from Michigan.

Mr. PETERS. Mr. President, I ask unanimous consent that it be in order to make the same request with respect to Executive Calendar No. 511, Susan Grundmann, of Virginia, to be a Member of the Federal Labor Relations Authority for a term of five years expiring July 1, 2025.

The PRESIDING OFFICER. Is there objection?

Mr. SCOTT of Florida. Mr. President.

The PRESIDING OFFICER. The Senator from Florida.

Mr. SCOTT of Florida. I object.

The PRESIDING OFFICER. Objection is heard.

Mr. PETERS. Mr. President.

The PRESIDING OFFICER. The Senator from Michigan.

EXECUTIVE CALENDAR

Mr. PETERS. Mr. President, it is my understanding that the next two nominees that I will bring forward have been cleared, and I would certainly urge my colleagues to support their confirmation.

The first is Michael Kubayanda, nominated to serve a second term on the Postal Regulatory Commission.

Mr. Kubayanda joined the Commission in January of 2019 after he was unanimously confirmed by the Senate during the last administration. Earlier this month, his nomination was reported from committee by a bipartisan vote.

I will say that he brings insight and expertise from decades of experience in both government and the private sector. During his tenure as Chairman of the Commission, Mr. Kubayanda has demonstrated his commitment to working in a bipartisan manner to make the Postal Service more effective and accountable.

I would urge my colleagues to join me in supporting his nomination.

Next, Mr. President, I would ask my colleagues to join me in confirming Erik Hooks to be Deputy Administrator of the Federal Emergency Management Agency, or FEMA.

The Deputy Administrator helps lead FEMA's work preparing for and responding to disasters, ranging from hurricanes to historic flooding and wildfires, to the COVID–19 pandemic.

Mr. Hooks has more than 30 years of public safety experience, including serving as secretary of public safety and homeland security advisor for the State of North Carolina, where his responsibilities included overseeing the State's emergency management agency.

I would urge my colleagues to join me in swiftly confirming Mr. Hooks to this important role as well.

So, Mr. President, I would ask unanimous consent that the Senate consider the following nominations en bloc: Calendar No. 558 and Calendar No. 555; that the Senate vote on the nominations en bloc without intervening action or debate; that the motions to reconsider be considered made and laid upon the table with no intervening action or debate; that any statements related to the nominations be printed in the RECORD; and that the President be immediately notified of the Senate's action.

The PRESIDING OFFICER. Is there objection?

Without objection, it is so ordered.

The question is, Will the Senate advise and consent to the nominations of Michael Kubayanda, of Ohio, to be a Commissioner of the Postal Regulatory Commission for a term expiring November 22, 2026 (Reappointment); and Erik Adrian Hooks, of North Carolina, to be Deputy Administrator, Federal Emergency Management Agency, Department of Homeland Security, en bloc?

The nominations were confirmed en bloc.

The PRESIDING OFFICER. The Senator from Oregon.

EXECUTIVE CALENDAR—Continued

NOMINATION OF CHRIS MAGNUS

Mr. WYDEN. Mr. President, the Senate will soon vote on the nomination of Chief Chris Magnus to lead the U.S. Customs and Border Protection Office, and I was very pleased that the Senate Finance Committee could advance this important nomination.

I want to give the Senate a brief assessment of why I think Chief Magnus is going to handle his job very well.

He brings a unique combination of smarts, common sense, and fairness, and that is really what this job is all about. For example, having talked to the chief at some length, he understands that strongly enforcing our immigration laws and treating immigrants and asylum seekers humanely are not mutually exclusive. You can do both. They are not incompatible. It is a perspective, in my view, on immigration that is going to help our communities, help public safety, and help our economy all at the same time.

Now, there is no doubt in my mind that Chief Magnus has the right qualifications for this position. He is highly experienced. He started out in Lansing, MI, and has headed up law enforcement agencies across the country—East, West, North, and South.

Currently, he serves as the chief of police in Tucson, AZ. That means we will have an individual leading Customs and Border Protection who starts on day 1—day 1—with firsthand knowledge about the challenges law enforcement on the southern border.

Even beyond that specific element of Customs and Border Protection's work, his range of experience in law enforcement all over the country makes him an ideal pick to lead an Agency with tens of thousands of employees, staffing more than 300 points of entry to our country.

So I think that is the heart of why he is going to be such a positive force with respect to border security, but I also want to note that on the Finance Committee, we are acutely aware that Customs and Border Protection is not just in the business of immigration; it is also on the frontlines of enforcing American trade laws. And too often in the past, that part of the mission has just gotten short shrift.

Today, Customs and Border Protection is the heart of the effort to fight against immoral and unfair trade practices, including the use of forced labor in China and elsewhere. Customs and Border Protection not only investigates forced labor and demands remediation where appropriate, it also enforces the ban on forced labor products entering our country.

Staying a step ahead of trade cheats, whether they are involved in forced labor or not, is key to protecting American jobs, our businesses, and innovation. Workers and businesses depend on healthy, functioning supply chains. We have certainly seen, since the beginning of the pandemic, that when the supply chains break down, you have enormous headaches throughout the economy, from the biggest businesses right down to individual families who are shopping this holiday season for typical holiday goods.

During his nomination hearing, Chief Magnus assured the Finance Committee that Customs and Border Protection's trade mission is going to get the focus and the resources it needs if he is confirmed. He has committed to ensuring that there is adequate staffing at our ports, and he is interested in improving the efficiency of our customs operations in a way that maintains key protections for consumer safety.

He is a first-rate nominee. It is clear he has got the right priorities when it comes to Customs and Border Protection challenges that many of our Senators care about most—securing the border and helping to get supply chains back to normal.

I believe that he is going to work with all of the Members of this body on

immigration and trade-related issues going forward in a way that brings Democrats and Republicans together. I am very happy to support him today.

And as our committee has spent the most time with the chief, I would like to say, as chairman of the committee, that I think he will reflect great credit on our country in a vital position, a position that comes up every day in activities across the land. He is the right person for this important job at the right time.

I urge all Senators to vote for Chief Magnus later today.

I yield the floor.

I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The senior assistant legislative clerk proceeded to call the roll.

Mr. DURBIN. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

UNANIMOUS CONSENT REQUEST—EXECUTIVE CALENDAR

Mr. DURBIN. Mr. President, I rise today to speak about an issue of vital importance involving the U.S. attorneys.

Each of the 93 U.S. attorneys serves as the chief Federal law enforcement officer within his or her jurisdiction. U.S. attorneys prosecute the full spectrum of criminal cases brought on behalf of the United States, from hate crimes to human trafficking, to gang violence, to cyber crime, to narcotics, to financial fraud, to terrorism. The list is long, and the violations of the law that are alleged are serious.

The position of the U.S. attorney is nearly as old as the Nation itself. In fact, the position has existed since the First Congress. President George Washington signed into law the law that created these attorneys in the Judiciary Act of 1789.

Given the critical role that these U.S. attorneys play in bringing justice to those who violate Federal criminal laws, it is hard to imagine that any Member of this body would obstruct efforts to confirm these law enforcement officials. Doing so could threaten public safety and puts at risk millions of Americans' security.

It is also a stark departure from what has happened before. The last time the Senate required a rollcall vote on a U.S. attorney nominee was 1975. Forty-six years have passed without the request for a rollcall vote on a U.S. attorney. For decades, the Senate has confirmed U.S. attorneys by a voice vote or unanimous consent after they have been considered in the Judiciary Committee.

Listen to this: During the Trump administration, 85 of President Trump's U.S. attorney nominees moved through the Judiciary Committee in the Senate. Of those 85, the Senate confirmed every single Trump nominee by unanimous consent without even requesting a record vote. I might add just for the record, I believe one nominee was held for 1 week so that a question could be answered about his background. That is the only thing that I can recall where they even slowed down the process during the Trump administration. Certainly, it was within our power as Democrats to stop and require a vote, but we didn't. Yet now there is a Republican objection to holding a voice vote on five U.S. attorney nominees: Greg Harris for the Central District of Illinois, Clare Connors for Hawaii, Zachary Cunha for Rhode Island, Nikolas Kerest for Vermont, and Philip Sellinger for New Jersey.

Several of these nominees have been held up for weeks—weeks—by this objection. Why, you ask, is there an objection to these five nominees? There must be something wrong with their records. Well, let's take a look.

Greg Harris is a personal friend of mine. I practiced law with him in Springfield, IL. He spent nearly three decades as assistant U.S. attorney in the Central District of Illinois. That includes my hometown. He has tried over 50 cases to verdict and held a number of leadership positions in the U.S. Attorney's Office. He serves on the Central Illinois Human Trafficking Task Force and the Bankruptcy Fraud Working Group.

His nomination is historic. He will be the first African-American U.S. attorney in the Central District of Illinois, which, of course, is located in Mr. Lincoln's hometown of Springfield—the first.

Clare Connors is currently the attorney general of Hawaii. Ms. Connors previously served as criminal prosecutor in the Justice Department's Tax Division, special assistant U.S. attorney in the Eastern District of Virginia, and for nearly 7 years an assistant U.S. attorney in Hawaii.

Zachary Cunha, currently an assistant U.S. attorney in the District of Rhode Island in the same office he will lead upon confirmation—he has worked there for 8 years, following time as an assistant U.S. attorney in both the Eastern District of New York and the District of Massachusetts.

Nikolas Kerest, also an assistant U.S. attorney, served in the District of Vermont since 2010, following time in private legal practice in Maine and Massachusetts and a clerkship on the Second Circuit Court of Appeals.

Philip Sellinger has had a long and distinguished legal career in New Jersey. He began his legal career as a law clerk for Judge Anne Thompson of the District of New Jersey before joining the U.S. Attorney's Office in Newark. For the past two decades, Mr. Sellinger has been a litigator in a prominent law firm and even served as the firm's co-chair of global litigation.

Listen to these biographies. All five of these nominees are eminently qualified to hold the office of U.S. attorney, to prosecute crimes and bring civil actions on behalf of the government, and to help safeguard our communities across America.

There is one thing that all of these U.S. attorney nominees have in common, though. They are all from States with two Democratic Senators. That seems to be the only thing that they might have in common. The objections to these nominees are not that they aren't qualified or that the job is not important; the objection seems to be that they are from States with two Democratic Senators.

So when it comes to critical issues we expect, in the Department of Justice, to be taken care of by U.S. attorneys—issues involving terrorism, human trafficking, narcotics, public corruption, gun violence, the safety of our communities—is the fact that they happen to hail from States with two Democratic Senators enough to disqualify them or to leave these positions vacant?

It is time to end the Republican delay and get these well-qualified prosecutors confirmed and on the job.

We never once during the Trump administration's 4 years held up a U.S. attorney when it came to a voice vote, a unanimous voice vote, to give them the opportunity to serve this country. It is unthinkable that we are going to do this to these fine men and women today. So, today, I will ask unanimous consent for a vote on these nominees.

I ask unanimous consent that the Senate consider the following nominations: Calendar Nos. 534, 535, 536, 581, and 582; that the nominations be confirmed; that the motions to reconsider be considered made and laid upon the table with no intervening action or debate; that no further motions be in order to the nominations; that any related statements be printed in the RECORD; and that the President be immediately notified of the Senate's action.

The PRESIDING OFFICER. Is there objection?

The Senator from Arkansas.

Mr. COTTON. Mr. President, I reserve the right to object.

The Senate is a special institution. It is a unique institution. James Madison said the Senate was the only truly innovative part of our Constitution.

It remains the case today that our Senate is the only upper Chamber in a Western parliament that has more power under our Constitution than does the lower Chamber. That is in part because of the design of the Senate in our Constitution; because of our Senate rules, of our traditions, of our customs.

We have heard a lot about courtesy and collegiality and respect. Those are very important customs around here, but it has to be a two-way street.

Earlier this year, in the Judiciary Committee, during the markup for Vanita Gupta to be Associate Attorney General, I was speaking, as is my right under the Judiciary Committee rules. There was at least one other Republican Senator who was preparing to speak. There may have been more. The Senator from Illinois, in his role as

chairman of the committee, cut off my remarks and forced through the vote on Vanita Gupta, all so he could save 1 week to get her confirmed—just 1 week.

I said right here at this desk 9 months ago that when our rules and our traditions are so flagrantly breached, there has to be some kind of consequence, and I outlined exactly what that consequence would be at the time: that I would not expedite consideration, as the Senator from Illinois rightly observes is the custom here, for any U.S. attorney nominee from a State represented by a Democrat on the Judiciary Committee because if there are not consequences when rules and traditions are breached in this institution, we will soon not have rules and traditions.

Now, I also said that if the Senator from Illinois would simply express regret for what happened that day and pledge that it wouldn't happen again, I would be happy to let all of these nominees move forward. We have communicated this to the Senator from Illinois and his staff on multiple occasions. I reiterated today that I would be happy to confirm these nominees in the following few minutes if the Senator from Illinois would simply express regret for what happened in the hearing that day and commit that it won't happen again, which, I say again, is simply committing that we follow our own rules. If we hear that from the Senator from Illinois, we will have five new U.S. attorneys.

And I see the Senators from Rhode Island and Hawaii and New Jersey are here. As the Senator from Illinois said, I have no objection to moving forward with any of these particular nominees. All these States can have their U.S. attorneys this afternoon, but if not, I will have to continue to insist that we not expedite these nominations. So I object.

The PRESIDING OFFICER (Mr. MARKEY). Objection is heard.

The Senator from Illinois.

Mr. DURBIN. Mr. President, I have been trying to understand the Republican objection to these well-qualified U.S. attorney nominees, and the Senator from Arkansas has made it clear. It has nothing to do with them; it is about me.

He, obviously, doesn't approve of what happened one day in the committee. And the price to be paid is not by me but by the U.S. attorneys, well-qualified, who have important jobs to fill.

One member of the Republican caucus is upset with the fact that back in March—this happened in March—the Judiciary Committee moved to vote on the nomination of Vanita Gupta to be Associate Attorney General when Republican members of the committee had not finished speaking on her nomination.

He correctly remembers that he was speaking at approximately 10 minutes to 12 p.m., when I interrupted him, took a rollcall vote, and went back to him if he wished to speak again.

I will be the first to acknowledge that I moved forward with the vote on Ms. Gupta's nomination over the objections of committee Republicans. But put simply, the Republicans forced my hand that day.

The Senator from Arkansas talks about courtesy in this body. I will tell him I think that it should be a hallmark of what we all do at all times. I am fortunate, truly blessed, in my mind, to have, as the ranking member of the Senate Judiciary Committee, a real friend in CHUCK GRASSLEY, the Republican Senator of Iowa.

I asked him that day what was going on. I had informed the committee in writing that we would proceed with a vote on Ms. Gupta that day. I then allowed committee Republicans to speak for 94 minutes on Ms. Gupta's nomination, even though much of what was said was repetitive—some false and some really unwarranted.

I was, in fact, prepared to allow committee Republicans to speak for as long as they wished. I turned to Senator GRASSLEY and said: ''What's the plan here?'' And he said: ''Well, Senator TILLIS may return and speak, and we just have these members speaking.''

I had received assurances that the Republicans would not use an obscure Senate rule, the 2-hour rule, to cut off the markup before we voted on Ms. Gupta's nomination. But at 11:55 a.m., I was surprised, as was Senator GRASSLEY, to be informed that despite their earlier assurances, a Republican Senator had, in fact, invoked the 2-hour rule in an effort to prevent Ms. Gupta's nomination from being considered that day and to close down the markup in the committee.

My hand was forced by this action. It was a surprise move, a tactical move, surely within the rules for them to make, but I did exactly what previous Republican chairs of the Judiciary Committee did in similar situations. I ended the debate and called for the vote on the nomination.

If you are listening to this and wondering what these arcane committee procedures have to do with U.S. attorney nominations, you are not alone. The Senator is pleading that we should stand by the traditions of the Senate. And by the traditions of the Senate, these U.S. attorney nominees would go through by unanimous consent. That is a tradition of the Senate as well.

The simple answer is, what happened with the markup debate more than 8 months ago has nothing to do with these five fine individuals or with any other U.S. attorney nominee who may come before the Senate.

If the Senator from Arkansas wants me to publicly express my regret for this occurrence, I express that regret. But I want to make it clear, I relied on my friend Senator GRASSLEY. We were both surprised to know that someone had invoked the 2-hour rule. Caught by surprise, I did what other Republican chairs of the committee have done.

I don't believe we should play politics with critical law enforcement nominations. They are putting our communities at risk and politicizing law enforcement in a way that threatens public safety.

If we are going to truly stand up for law and order, let these men and women go to work across America representing the Department of Justice.

The PRESIDING OFFICER. The Senator from Arkansas.

Mr. COTTON. Mr. President, I would like to address the Chair with a question to the Senator from Illinois.

I appreciate those comments. I would observe that since that day, we have not had a similar circumstance in which any Republican wishing to speak was cut off in a markup.

Can we simply have a commitment that that will not happen again in the future, as it hasn't happened in the last 9 months?

The PRESIDING OFFICER. The Senator from Illinois.

Mr. DURBIN. Responding through the Chair, as long as there is openness and honesty about what is happening in the procedure, I will assure you that I will do everything I can to extend that courtesy forward.

That particular day, you may or may not be aware of the fact that while you were speaking, we learned—Senator GRASSLEY and I both learned that someone had raised the 2-hour rule, and it came as a surprise to both of us.

When we are open and honest about what we are trying to achieve in a committee, there is no reason why we can't abide by basic courtesy in the tradition of the Senate.

Mr. COTTON. Mr. President, I appreciate the remarks from the Senator of Illinois. I will invite him to make his unanimous consent request again. I do not intend to object further. And a voice vote is fine.

EXECUTIVE CALENDAR

Mr. DURBIN. Mr. President, I ask unanimous consent that the Senate consider the following nominations en bloc: Calendar Nos. 534, No. 535, No. 536, No. 581, and No. 582; that the Senate vote on the nominations en bloc without intervening action or debate; that the motions to reconsider be considered made and laid upon the table with no intervening action or debate; that any statements related to the nominations be printed in the Record; and that the President be immediately notified of the Senate's action.

The PRESIDING OFFICER. Without objection, it is so ordered.

The Senate will proceed to the nominations en bloc.

The question is, Will the Senate advise and consent to the following nominations en bloc: Clare E. Connors, of Hawaii, to be United States Attorney for the District of Hawaii for the term of four years; Zachary A. Cunha, of Rhode Island, to be United States Attorney for the District of Rhode Island

for the term of four years; Nikolas P. Kerest, of Vermont, to be United States Attorney for the District of Vermont for the term of four years; Gregory K. Harris, of Illinois, to be United States Attorney for the Central District of Illinois for the term of four years; and Philip R. Sellinger, of New Jersey, to be United States Attorney for the District of New Jersey for the term of four years?

The nominations were confirmed en bloc.

The PRESIDING OFFICER. The President will be immediately notified of the Senate's action.

The Senator from Rhode Island.

Mr. WHITEHOUSE. Mr. President, I just want to thank my colleague Senator COTTON and my chairman Senator DURBIN for the way in which that resolved itself. For a minute, we actually feel like a Senate here.

Mr. DURBIN. Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The senior assistant legislative clerk proceeded to call the roll.

Ms. SMITH. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

VOTE ON MAGNUS NOMINATION

The question is, Will the Senate advise and consent to the Magnus nomination?

Ms. SMITH. Mr. President, I ask for the yeas and nays.

The PRESIDING OFFICER. Is there a sufficient second?

There appears to be a sufficient second.

The clerk will call the roll.

The legislative clerk called the roll.

Mr. DURBIN. I announce that the Senator from Vermont (Mr. LEAHY) is necessarily absent.

Mr. THUNE. The following Senators are necessarily absent: the Senator from Arkansas (Mr. COTTON) and the Senator from Oklahoma (Mr. LANKFORD).

The result was announced—yeas 50, nays 47, as follows:

[Rollcall Vote No. 483 Ex.]

YEAS—50

Baldwin	Heinrich	Reed
Bennet	Hickenlooper	Rosen
Blumenthal	Hirono	Sanders
Booker	Kaine	Schatz
Brown	Kelly	Schumer
Cantwell	King	Shaheen
Cardin	Klobuchar	Sinema
Carper	Luján	Smith
Casey	Manchin	Stabenow
Collins	Markey	Tester
Coons	Menendez	Van Hollen
Cortez Masto	Merkley	Warner
Duckworth	Murphy	Warnock
Durbin	Murray	Warren
Feinstein	Ossoff	Whitehouse
Gillibrand	Padilla	Wyden
Hassan	Peters	

NAYS—47

Barrasso	Burr	Crapo
Blackburn	Capito	Cruz
Blunt	Cassidy	Daines
Boozman	Cornyn	Ernst
Braun	Cramer	Fischer
Graham	Marshall	Scott (FL)
Grassley	McConnell	Scott (SC)
Hagerty	Moran	Shelby
Hawley	Murkowski	Sullivan
Hoeven	Paul	Thune
Hyde-Smith	Portman	Tillis
Inhofe	Risch	Toomey
Johnson	Romney	Tuberville
Kennedy	Rounds	Wicker
Lee	Rubio	Young
Lummis	Sasse	

NOT VOTING—3

Cotton	Lankford	Leahy

The nomination was confirmed.

The PRESIDING OFFICER (Mr. PETERS). Under the previous order, the motion to reconsider is considered made and laid upon the table and the President will be immediately notified of the Senate's action.

The majority leader.

LEGISLATIVE SESSION

Mr. SCHUMER. Mr. President, I move to proceed to legislative session.

The PRESIDING OFFICER. The question is on agreeing to the motion.

The motion was agreed to.

The PRESIDING OFFICER. The Senator from Kentucky.

MOTION TO DISCHARGE

Mr. PAUL. Mr. President, I move to discharge S.J. Res. 31 from the Foreign Relations Committee.

The PRESIDING OFFICER. The motion is pending.

Mr. PAUL. Mr. President, the most common cause of famine and starvation is war. Saudi Arabia's air and naval blockade of Yemen has led to thousands and thousands of deaths in Yemen from lack of food and medicine. The United States should end all arms sales to the Saudis until they end their blockade of Yemen.

President Biden said he would change the Trump policy of supporting Saudi's war in Yemen, but it is not all that apparent that policy has changed.

Today, we challenge the Biden administration's sale of $650 million worth of arms, including air-to-air missiles in Yemen.

Just 2 months ago, the Biden administration approved $500 million worth of arms, including maintenance for attack helicopters that are used in Yemen.

Some want to differentiate offensive weapons from defensive weapons, but, really, even defensive weapons can be used to allow a country to absorb attacks in order to continue their offensive operations.

The real question is not an artificial designation of weapons as offensive or defensive but whether Congress is serious about using the leverage of arms sales or withholding arms sales to end the blockade in Yemen.

That the Biden administration continues to reward Saudi Arabia with weapons seems to indicate that President Biden is not really serious about withholding arms sale to end the war in Yemen.

Indeed, if this administration were serious about ending the Saudi blockade, they could do one thing, and this thing would end the war tomorrow, would end the blockade tomorrow. The Saudis, I think, would immediately stop the blockade if this administration would stop sending spare parts and stop fixing the planes.

Bruce Reidel of Brookings writes that ''the Saudi air force would be grounded in short order'' if we quit sending them spare parts, quit repairing their aircraft. We could stop this war if we really had the will to do it.

All America should be appalled at the humanitarian disaster caused by the Saudi blockade of Yemen. For years now, ships that would otherwise carry food, fuel, and medicine are turned away by the Saudi-led coalition, depriving the Yemeni people of the necessities to sustain civilization.

Yemen is one of the poorest countries on the planet. They have to import their food. The blockade is killing their children.

Saudi Arabia's intervention in the Yemeni civil war is a chilling example of the cruelty of warfare by starvation. According to the United Nations, in Yemen 5 million people are one step away from succumbing to famine and disease, and 10 million more are right behind them.

We can start the process of ending this crisis by enacting this resolution of disapproval.

The children of Yemen who survive Saudi's barbaric blockade will inevitably tell their sons and daughters of the horrors of their youth, and those sons and daughters will tell their sons and daughters. Through oral tradition, a thousand generation of Yemenis will know of the Crown Prince's ruthlessness, and they will also know that it was the Americans who sold the weapons to wage this murderous campaign.

The reports from Yemen are literally a nightmare. The Washington Post reported recently of a 3-year-old boy who cannot walk or speak, who weighs 10 pounds—a 3-year-old boy who weighs 10 pounds. The images are grotesque. His face is ''skeletal.'' His arms and legs are as ''thin as twigs.'' He weighs 10 pounds. His father says that he sometimes goes days without any food.

And we are complicit. We are arming the Saudis and allowing this to happen. Offensive, defensive—they shouldn't get any of our weapons. We should stop selling them any weapons until they stop starving the country of Yemen.

The New York Times tells the story of a mother who, after 3 days of failing to get a ride, carried her 8-month-old while walking 2 hours to reach medics to treat her child's acute malnutrition. But even after a week of treatment with enriched formula, the boy still lay motionless on his hospital bed.

Tens of thousands of children have already died from disease and malnutrition from this war, and we should not be complicit. We should not be aiding the Saudis.

International aid agencies, which also have to fight the Saudi blockade to provide assistance, put it this way:

The people of Yemen are not starving. They are being starved.

The Saudi's siege of Yemen is made possible because of American weaponry. The arsenal provided by the United States includes billions of dollars' worth of military aircraft and thousands of air-to-ground munitions.

Only weeks ago, the Biden administration approved a new $650 million sale of 280 advanced medium air-to-air missiles and 596 missile launchers. As painful as it is to admit, the United States is an accessory to this Saudi savagery.

President Biden says the latest sale is merely to help defend Saudi territorial integrity, but the Commander in Chief's words do not match Saudi actions. According to William Hartung, the director of the Arms and Security Program for the Center for International Policy, ''the air blockade is enforced by a threat to shoot down any aircraft, military or civilian, that enters Yemeni air space. . . . The provision of air-to-air missiles gives further credibility to this threat, dissuading any government or aid group from bringing in crucial medicines or flying patients in and out of Yemen.

These weapons are not purely defensive. They are used as a threat to any aircraft that brings aid into Yemen, and they are part of the blockade. They are part of the problem, and it is our leverage.

These weapons belong to the American people. They may be made by private companies, but they are owned by the American people because we commission these weapons, and we should not give them to countries that are starving children and committing, essentially, genocide in Yemen.

In other words, no weapon is exclusively defensive, and continuing arms sales means continued death and destruction in Yemen.

We must end America's complicity in Saudi Arabia's war on the Yemeni people. If you believe in humanitarianism, if you believe America is a force for good that serves as a model for other nations to emulate, if you believe that the crushing of the Yemeni people must be stopped, then you must vote for this resolution of disapproval.

We have a chance to tell the Crown Prince that American arms sales will end until he gives up his starvation campaign. We can end the Saudi blockade and bring relief to the long-suffering people of Yemen.

Should we fail to seize this opportunity, history will not let us forget that America, the last best hope for humanity, failed to protect defenseless civilians from the cruelty of a criminal regime.

The PRESIDING OFFICER. The Senator from Vermont.

Mr. SANDERS. Mr. President, I find myself in the somewhat uncomfortable and unusual position of agreeing with Senator PAUL. And let me thank him and Senator LEE for their hard work in reclaiming Congress's congressional war powers, another very important issue. The understanding that it is Congress that has the constitutional responsibility to authorize war—not the President—should, in fact, transcend partisan disagreements.

On November 18, we introduced a congressional resolution of disapproval to block the sale of 280 air-to-air missiles, 596 missile launchers, and other weapons and support—totaling some $650 million—to Saudi Arabia. That is what we will be voting on in a few minutes.

Let me be very clear. As the Saudi Government continues to wage its devastating war in Yemen and repress its own people, we should not be rewarding them with more arms sales. We should be demanding that they end the devastating war in Yemen, which has killed over 230,000 people in one of the very poorest countries on Earth. For more than 6 years, the Saudi-led military intervention in Yemen's civil war has been a key driver of the largest humanitarian disaster in the world—the largest.

According to UNICEF, four out of every five children in Yemen need humanitarian assistance—that is over 11 million children—400,000 children suffer from severe malnutrition; 1.7 million children have been displaced from their homes by violence from this war; and some 15 million people, more than half of whom are children, do not have access to safe water, sanitation, or hygiene.

United Nations humanitarian relief coordinator Martin Griffiths said in September: ''The country's economy has reached new depths of collapse, and a third wave of the pandemic is threatening to crash the country's already fragile healthcare system.''

According to Griffiths, millions of Yemenis are ''a step away from starvation.'' In other words, this poor country is hell on Earth. It is the worst humanitarian disaster on a planet.

Under first the Obama administration and then the Trump administration, the United States was Saudi Arabia's partner in this horrific war. In 2019, Congress made history—and I am very proud of that, and we did this in a bipartisan way—by passing the first-ever War Powers Resolution through both Chambers of Congress, pressing then-President Trump to end this military support. It marked the first time that Congress invoked the War Powers Resolution of 1973 to direct the President to withdraw troops from an undeclared war.

Sadly, tragically, President Trump vetoed that resolution.

Many of us welcomed the Biden administration's announcement earlier this year that it would end U.S. support for offensive military operations led by Saudi Arabia in Yemen and name a special envoy to help bring this conflict to an end, but the crisis has only continued.

American defense contractors continue to service Saudi planes that are waging the war, and the U.S. military also continues to provide intelligence to the Saudi Armed Forces. And now, tonight, we are looking at a new $650 million arms sale to the Saudi Armed Forces.

Now, I am aware that ending U.S. military support for Saudi Arabia's brutal assault will not alone end the multisided conflict in Yemen. The Houthis are launching bloody attacks on the central Yemeni city of Marib and increasing cross-border attacks on Saudi territory. Violence has also erupted between rival factions in the south of Yemen. A U.N. expert panel found that all parties to the conflict may have committed war crimes.

U.S. policy toward Saudi Arabia and this war should be clear: The United States must do everything in our power to bring this brutal and horrific war to an end. Exporting more missiles to Saudi Arabia does nothing but further this conflict and pour more gasoline on an already raging fire.

In my view, the United States must support an international observer mission along the Saudi-Yemeni border and spearhead generous international development efforts to rebuild Yemen. This aid should be focused on bolstering local humanitarian and development initiatives, like Yemen's Social Fund for Development.

We must also dramatically increase our diplomatic engagement to press Saudi Arabia, the Riyadh-based Republic of Yemen Government, and the Houthis to accept the U.N.'s roadmap as the basis for a compromise that ends foreign military intervention and allows Yemenis to come to an agreement. The war has gone on for too long, and it is time for the United States to be bold and to be decisive in bringing about peace.

I also think that it is long past time that we took a very hard look at our relationship with Saudi Arabia, a country whose government represents the very opposite of what we profess to believe in. Saudi Arabia is an extremely undemocratic country that is run by a hereditary, authoritarian monarchy, one of the wealthiest families in the world whose wealth is estimated to be over $1.4 trillion.

At a time when children in Yemen are starving to death, when that impoverished country's healthcare system is collapsing, when the people of Gaza are suffering mass unemployment and environmental devastation, when people throughout that region lack clean drinking water, Saudi Crown Prince Muhammad bin Salman bought himself a $500 million yacht, a $300 million French chateau, and a $450 million Leonardo da Vinci painting. Mass starvation in the region that he helped create, children do not have housing or drinking water, and this guy buys himself a $450 million da Vinci painting.

According to Freedom House, a respected human rights organization:

Saudi Arabia's absolute monarchy restricts almost all political rights and civil liberties. No officials at the national level are elected. The regime relies on pervasive surveillance, the criminalization of dissent, appeals to sectarianism and ethnicity, and public spending supported by oil revenues to maintain power. Women and religious minorities face extensive discrimination in law and in practice.

Freedom House also notes that working conditions for the large migrant labor force are extremely exploitive.

Saudi Arabia is home to millions of migrant workers, many from African countries but also from Pakistan, India, and elsewhere. These workers constitute more than 80 percent of the private-sector workforce, often as laborers and other service workers. They are governed by an abusive system that gives their employers excessive power over their mobility and legal status in the country. As a result, these migrant workers are vulnerable to a wide range of abuses, from passport confiscation to delayed wages and forced labor.

According to Human Rights Watch, under the government headed by Crown Prince Muhammad bin Salman, ''Saudi Arabia has experienced the worst period of oppression in its modern history.''

Human Rights Watch reported earlier this year that ''accounts have emerged of alleged torture of high-profile political detainees in Saudi prisons,'' including Saudi women's rights activists and others. The alleged torture included electric shocks, beatings, whippings, and sexual harassment.

And I think we all understand the nature of this government. Every Member of Congress and I hope every American knows—and our own intelligence services made this very clear—that Muhammad bin Salman himself ordered the murder and the dismemberment of Washington Post columnist Jamal Khashoggi in 2018 in retaliation for Khashoggi's criticisms of the Saudi regime. We all remember that terrible, terrible murder of a Washington Post columnist.

We also know that the Saudi regime has waged a campaign of harassment and attempted kidnapping against other critics, including on U.S. soil.

My simple question is: Why in the world would the United States reward such a regime which has caused such pain in Yemen with more weapons?

My friends, the answer is we should not. I urge my colleagues to support S.J. Res. 31.

The PRESIDING OFFICER. The Senator from New Jersey.

Mr. MENENDEZ. Mr. President, I rise today to oppose the joint resolution of disapproval on the sale of air-to-air missiles to Saudi Arabia, which are being used to defend against armed drone attacks from the Houthis.

I think everybody in this body well knows that I carefully consider every arms sale that comes before the Senate Foreign Relations Committee for review. Arms sales are a critical tool of foreign policy that can help bolster alliances while keeping Americans and our partners safe.

However, we have to ensure that our arms sales policies adhere to our core values, including respect for human rights and human dignity. It is for that very same reason that I, along with a series of my colleagues here, introduced the Safeguarding Human Rights in Arms Exports Act—or the SAFEGUARD Act—to make the protection and promotion of human rights a core statutory principle in our arms sales export and monitoring process.

This legislation would enhance our collective oversight of all arms sales to countries that abuse human rights, and I hope it receives consideration in this body and in the House soon.

Now, my colleagues may well remember in 2019 and 2020, that when I truly believe an arms sale undermines our American values, our national security, or when 22 sales are notified under false ''emergency'' pretenses, for example, I will not hesitate to use the tools we have to stop those sales. In fact, that is exactly what we did in this body when I came to this floor and led that effort, in conjunction with others.

Beyond these extreme measures, the committee carefully consults with the State Department and others on the ground to fully understand how weapons will be used.

We have all known for years that there is no military solution to the devastating and tragic conflict in Yemen. Indeed, the Senate Foreign Relations Committee passed my bipartisan Saudi Arabia Accountability and Yemen Act in 2019, which would have halted certain arms sales, stopped refueling, imposed accountability on the people involved in the murder of Jamal Khashoggi, and sought to end the suffering of the Yemeni people. Unfortunately, the full Senate failed to act.

Make no mistake, the Saudi-led coalition bears the brunt of the responsibility for the devastation in Yemen. Yet I, along with most Members of this body, have always supported the use of weapons systems in defense of civilian populations.

I wish to remind my colleagues that the Biden administration has largely suspended sales of many of the offensive weapons the Trump administration was all too happy to sell to the Saudis. However, there is no denying that the Houthis have been increasingly deploying more sophisticated weapons, particularly armed aerial drones, to target civilian populations in Saudi Arabia, and let's not also forget that we have 70,000 American citizens living in Saudi Arabia.

The weapons up for discussion today are being used in this context to defend against these aerial attacks. As air-to-air missiles, they are largely incapable of attacking civilian targets or infrastructure—a critical factor in my decision to support the sale.

While some have argued they could be used to support the Saudi blockade, the fact is that most humanitarian aid is delivered via land and sea. Indeed, tragically, the Saudis have been perfectly capable of blocking the delivery of aid for many years, and in more recent years, the Houthis have also created abhorrent obstacles for the delivery of food, medical supplies, and other vital humanitarian aid, contributing to the worst humanitarian crisis in the world.

While I believe the United States must continue pushing for a political solution to the crisis in Yemen—and I agree with several of the things said by my colleague Senator SANDERS—I also believe that we should continue supporting efforts to stop attacks on civilians. According to the State Department, there have been close to 400 Houthi attacks this year, many of which get past the Patriot missile defense system.

I know that many see this vote as an opportunity to voice dissatisfaction with Saudi Arabia over a variety of its policies, from Yemen to the murder of Jamal Khashoggi, which we have not forgotten, to the harassment of American citizens and their family members.

So let me be clear that I completely agree with the need to push harder to hold Saudi leadership accountable for a variety of actions. I even offered a bill last month as an amendment to the NDAA to do just that, and I am hopeful we will see some of that language in a final product. But I also believe it is important that our security partners know that we will uphold our commitments and prioritize security arrangements that protect civilians.

For that reason, I will oppose efforts to stop this particular sale. I will continue to hold sales as I have—there are many other sales that have not moved forward that I have not permitted to get out of the committee—and continue my efforts to hold Saudi leadership accountable and encourage my colleagues to do the same.

With that, I yield the floor.

The PRESIDING OFFICER. The Senator from Idaho.

Mr. RISCH. Mr. President, fellow Senators, I rise to oppose the matter that is before us, and I want to rise in support of the sale of these particular weapons to the Saudis.

The Saudis are an ally of ours. As with many allies, they have items that we don't agree with, and those obviously have been highlighted here on the floor today. My colleague, the chairman of the Foreign Relations Committee, has laid out exactly why we need to see that the sale goes through.

There have been 240-plus drone missiles to strike Saudi targets this year. The latest one was just yesterday. These are Houthi rebel drones that come out of Yemen. They are provided to them by the Iranians. This thing would be over if the Iranians would back away and get out of this.

I agree that we need to press for a solution here. What is going on in Yemen

is one of—not the but close to it—one of the worst humanitarian crises on the planet today. In fact, what is going on there, it is going to get worse as this year goes on. As the Senator from New Jersey indicated, the Houthis have been really unhelpful in getting humanitarian supplies to the people of Yemen, who badly need it.

The Saudis, obviously, need the weaponry that is included in this sale. There are a lot of American citizens in Saudi Arabia, and we should support our allies when they are doing defensive things like this to defend themselves, to defend Americans who are present in their country. We all hope that this will reach a resolution in the near future.

The Iranians are the ones who are stoking this fire. The Houthis are not helpful to us. But we need to help the Saudis defend themselves. So I would urge a ''no'' vote on this matter before us.

I yield the floor.

The PRESIDING OFFICER. The Republican leader.

Mr. MCCONNELL. Mr. President, earlier this year, a disastrous retreat from Afghanistan gave our allies and partners reason to doubt that the United States could be counted on. Today, some of our colleagues want to double down on that mistake by blocking defensive support to yet another important partner.

Saudi Arabia is literally surrounded by violent threats conceived, funded, and orchestrated by Iran. To the north, they have got Iran-backed terrorists sowing violence in Iraq and Syria. To the east, they have a gulf filled with the flags of Iran's own increasingly belligerent navy. To the south, the Saudis have Iran-backed Houthi terrorists strangling Yemen and lobbying rockets, missiles, and armed drones over their border.

To be sure, this violence and the plight of the Yemeni people have only worsened since the Biden administration removed the Houthis from the terrorist list and imposed new restrictions on our support to the Saudi-led coalition.

Around the world, from time to time, we all have legitimate concerns about the behavior of our partners, but we are in a better position to influence their conduct if they trust in our partnership. So our colleagues don't get to vent their moral outrage in a vacuum without accounting for what comes next.

A vote to block the sale of defensive military systems to Saudi Arabia would undermine one of our most important regional partners, but there is even more at stake. Whether we help or not, our Arab partners will still be under siege tomorrow. They still need military capabilities to defend themselves. And we know that Russia and China will happily sell them advanced weapons systems. The importance of so-called great power competition is a matter of general consensus. So we should be wary of turning our backs on longtime partners and of pushing them into the arms of our adversaries.

So here is what our colleagues' resolution would actually do. It would give the world yet another reason to doubt the resolve of the United States, and it would give our biggest adversaries a new foothold to exert their influence over a rapidly changing and important region.

The PRESIDING OFFICER. The Senator from New Jersey.

Mr. MENENDEZ. I ask that all remaining time be yielded back.

The PRESIDING OFFICER. Without objection, it is so ordered.

VOTE ON MOTION TO DISCHARGE

The question is on agreeing to the motion to discharge.

Mr. MENENDEZ. I ask for the yeas and nays.

The PRESIDING OFFICER. Is there a sufficient second?

There appears to be a sufficient second.

The clerk will call the roll.

The senior assistant legislative clerk called the roll.

The result was announced—yeas 30, nays 67, as follows:

Mr. DURBIN. I announce that the Senator from Vermont (Mr. LEAHY) is necessarily absent.

Mr. THUNE. The following Senators are necessarily absent: the Senator from Arkansas (Mr. COTTON) and the Senator from Oklahoma (Mr. LANKFORD).

[Rollcall Vote No. 484 Leg.]

YEAS—30

Baldwin	Kaine	Sanders
Booker	Lee	Schatz
Brown	Luján	Schumer
Cantwell	Markey	Smith
Casey	Merkley	Stabenow
Duckworth	Murray	Tester
Durbin	Ossoff	Van Hollen
Gillibrand	Padilla	Warnock
Heinrich	Paul	Warren
Hirono	Peters	Wyden

NAYS—67

Barrasso	Graham	Reed
Bennet	Grassley	Risch
Blackburn	Hagerty	Romney
Blumenthal	Hassan	Rosen
Blunt	Hawley	Rounds
Boozman	Hickenlooper	Rubio
Braun	Hoeven	Sasse
Burr	Hyde-Smith	Scott (FL)
Capito	Inhofe	Scott (SC)
Cardin	Johnson	Shaheen
Carper	Kelly	Shelby
Cassidy	Kennedy	Sinema
Collins	King	Sullivan
Coons	Klobuchar	Thune
Cornyn	Lummis	Tillis
Cortez Masto	Manchin	Toomey
Cramer	Marshall	Tuberville
Crapo	McConnell	Warner
Cruz	Menendez	Whitehouse
Daines	Moran	Wicker
Ernst	Murkowski	Young
Feinstein	Murphy	
Fischer	Portman	

NOT VOTING—3

Cotton	Lankford	Leahy

The motion was rejected.

The PRESIDING OFFICER (Ms. HASSAN). The Senator from Washington.

MORNING BUSINESS

Mrs. MURRAY. Madam President, I ask unanimous consent that the Senate be in a period of morning business, with Senators permitted to speak therein for up to 10 minutes each.

The PRESIDING OFFICER. Without objection, it is so ordered.

BUILD BACK BETTER ACT

Mrs. MURRAY. Madam President, I can say with confidence to the senior Senator from Kentucky, who spoke this morning on childcare, that as a former preschool teacher, we can rest assured that we are not at risk of a toddler takeover in the U.S. Senate.

But seriously, I have never heard so much misinformation in such a short time from one person. It is not at all clear to me that the senior Senator from Kentucky read the bill—the Build Back Better bill.

So I want to set some facts straight. Under our bill, working parents will have way more options and pay way less to send their child to a high-quality childcare provider they choose. It is the same with pre-K. Parents of 3- and 4-year-olds will have more options to send their kids to quality preschool for free. We are talking about parents saving thousands of dollars a year on childcare and pre-K, which are huge financial burdens to families right now.

It is also, by the way, a great deal for our States who, by the way, are already working with the Federal Government on childcare, and 44 States already have some form of publicly funded pre-K. So this plan is not some new outlandish idea. And, finally, religious providers and family-based providers are absolutely eligible.

So this isn't a radical plan. It is a practical solution to, again, a huge financial barrier that parents are facing today. It is not a toddler takeover. It is giving parents more choices and more affordability. Though I would actually prefer toddlers on the Senate floor to what I saw today.

And it is not far-left propaganda because I can't emphasize this enough: This is not a political question for parents. To them, the question is, Can I choose the provider I actually like or do I have to go to this cheaper one just because I can't afford the one I really want to send my kids to; or is it worth me going back to work if I have to pay as much for rent or mortgage or college tuition as I do to send my child to a provider that I trust; or how long am I going to be on this wait list, and what do I do in the meantime?

What Democrats want to do is make sure there are more affordable options out there for parents. What Senate Republicans want to do is nothing but watch the prices keep rising.

And here is the thing. I have seen again and again, when someone says you can't do something, it is because they are afraid that you will. It is because they are afraid that we will. Senate Republicans are shaking in their boots because we are really doing something that helps working parents with a big part of their costs.

So I am sure they are going to keep calling affordable childcare ''radical'' and insisting that it would be better to do just nothing, and I am equally sure that Democrats are going to get this done.

I yield the floor.

I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. SCHUMER. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER (Mr. PADILLA). Without objection, it is so ordered.

DR. LORNA BREEN HEALTH CARE PROVIDER PROTECTION ACT

Mr. SCHUMER. Mr. President, I ask unanimous consent that the Chair lay before the Senate the message to accompany S. 610.

The PRESIDING OFFICER. Without objection, it is so ordered.

The Presiding Officer laid before the Senate the following message from the House of Representatives:

Resolved, That the bill from the Senate (S. 610) entitled, ''An Act to address behavioral health and well-being among health care professionals'', do pass with an amendment.

MOTION TO CONCUR

Mr. SCHUMER. Mr. President, I move to concur in the House amendment.

CLOTURE MOTION

I send a cloture motion to the desk.

The PRESIDING OFFICER. The cloture motion having been presented under rule XXII, the Chair directs the clerk to read the motion.

The legislative clerk read as follows:

CLOTURE MOTION

We, the undersigned Senators, in accordance with the provisions of rule XXII of the Standing Rules of the Senate, do hereby move to bring to a close debate on the motion to concur in the House amendment to S. 610, a bill to address behavioral health and well-being among health care professionals.

Charles E. Schumer, Tina Smith, Martin Heinrich, Elizabeth Warren, Patty Murray, Tammy Duckworth, Tim Kaine, Gary C. Peters, Angus S. King, Jr., Richard J. Durbin, Brian Schatz, Margaret Wood Hassan, Jacky Rosen, Chris Van Hollen, Jeanne Shaheen, Christopher Murphy, Ron Wyden.

MOTION TO CONCUR WITH AMENDMENT NO. 4871

Mr. SCHUMER. Mr. President, I move to concur in the House amendment, with an amendment No. 4871, which is at the desk.

The PRESIDING OFFICER. The clerk will report the motion.

The senior assistant legislative clerk read as follows:

The Senator from New York [Mr. SCHUMER], moves to concur in the House amendment, with an amendment numbered 4871.

Mr. SCHUMER. I ask unanimous consent that further reading be dispensed with.

The PRESIDING OFFICER. Without objection, it is so ordered.

The amendment is as follows:

(Purpose: To add an effective date)

At the end add the following:

SEC. ___. EFFECTIVE DATE.

This Act shall take effect on the date that is 1 day after the date of enactment of this Act.

Mr. SCHUMER. I ask for the yeas and nays on the motion to concur with the amendment.

The PRESIDING OFFICER. Is there a sufficient second?

There appears to be a sufficient second.

The yeas and nays were ordered.

AMENDMENT NO. 4872 TO AMENDMENT NO. 4871

Mr. SCHUMER. Mr. President, I have an amendment to the amendment No. 4871, which is at the desk.

The PRESIDING OFFICER. The clerk will report.

The senior assistant legislative clerk read as follows:

The Senator from New York [Mr. SCHUMER], proposes an amendment numbered 4872 to amendment No. 4871.

Mr. SCHUMER. I ask that further reading be dispensed with.

The PRESIDING OFFICER. Without objection, it is so ordered.

The amendment is as follows:

(Purpose: To modify the effective date)

On page 1, line 3, strike ''1 day'' and insert ''2 days''.

MOTION TO REFER WITH AMENDMENT NO. 4873

Mr. SCHUMER. Mr. President, I move to refer the House message to the Committee on Finance with instructions to report back forthwith with an amendment numbered 4873.

The PRESIDING OFFICER. The clerk will report the motion.

The senior assistant legislative clerk read as follows:

The Senator from New York [Mr. SCHUMER], moves to refer the House message to accompany S. 610 to the Committee on Finance with instructions to report back forthwith with an amendment numbered 4873.

Mr. SCHUMER. I ask that further reading be waived.

The PRESIDING OFFICER. Without objection, it is so ordered.

The amendment is as follows:

(Purpose: To add an effective date)

At the end add the following:

SEC. ___. EFFECTIVE DATE.

This Act shall take effect on the date that is 5 days after the date of enactment of this Act.

Mr. SCHUMER. I ask for the yeas and nays on my motion.

The PRESIDING OFFICER. Is there a sufficient second?

There appears to be a sufficient second.

The yeas and nays were ordered.

AMENDMENT NO. 4874

Mr. SCHUMER. Mr. President, I have an amendment to the instructions, which is at the desk.

The PRESIDING OFFICER. The clerk will report.

The senior assistant legislative clerk read as follows:

The Senator from New York [Mr. SCHUMER], proposes an amendment numbered 4874 to the instructions on the motion to refer S. 610.

Mr. SCHUMER. I ask that further reading be waived.

The PRESIDING OFFICER. Without objection, it is so ordered.

The amendment is as follows:

(Purpose: To modify the effective date)

On page 1, line 3, strike ''5 days'' and insert ''4 days''.

Mr. SCHUMER. I ask for the yeas and nays on my amendment.

The PRESIDING OFFICER. Is there a sufficient second?

There appears to be a sufficient second.

The yeas and nays were ordered.

AMENDMENT NO. 4875 TO AMENDMENT NO. 4874

Mr. SCHUMER. Mr. President, I have an amendment to amendment No. 4874, which is at the desk.

The PRESIDING OFFICER. The clerk will report.

The senior assistant legislative clerk read as follows:

The Senator from New York [Mr. SCHUMER], proposes an amendment numbered 4875 to amendment No. 4874.

Mr. SCHUMER. I ask that further reading of the amendment be waived.

The PRESIDING OFFICER. Without objection, it is so ordered.

The amendment is as follows:

(Purpose: To modify the effective date)

On page 1, line 3, strike ''4 days'' and insert ''3 days''.

EXECUTIVE SESSION

EXECUTIVE CALENDAR

Mr. SCHUMER. Mr. President, I move to proceed to executive session to consider Calendar No. 486.

The PRESIDING OFFICER. The question is on agreeing to the motion.

The motion was agreed to.

The PRESIDING OFFICER. The clerk will report the nomination.

The legislative clerk read the nomination of Lucy Haeran Koh, of California, to be United States Circuit Judge for the Ninth Circuit.

CLOTURE MOTION

Mr. SCHUMER. Mr. President, I send a cloture motion to the desk.

The PRESIDING OFFICER. The cloture motion having been presented under rule XXII, the Chair directs the clerk to read the motion.

The legislative clerk read as follows:

CLOTURE MOTION

We, the undersigned Senators, in accordance with the provisions of rule XXII of the Standing Rules of the Senate, do hereby move to bring to a close debate on the nomination of Executive Calendar No. 486, Lucy Haeran Koh, of California, to be United States Circuit Judge for the Ninth Circuit.

Charles E. Schumer, Richard J. Durbin, Debbie Stabenow, Chris Van Hollen, Kirsten E. Gillibrand, Christopher A. Coons, Benjamin L. Cardin, Patty Murray, Alex Padilla, Tina Smith, Ben Ray Luján, Sheldon Whitehouse, Mazie K. Hirono, Elizabeth Warren, Jeff Merkley, Cory A. Booker, Brian Schatz.

LEGISLATIVE SESSION

Mr. SCHUMER. Mr. President, I move to proceed to legislative session.

The PRESIDING OFFICER. The question is on agreeing to the motion.

The motion was agreed to.

EXECUTIVE SESSION

EXECUTIVE CALENDAR

Mr. SCHUMER. Mr. President, I move to proceed to executive session to consider Calendar No. 533.

The PRESIDING OFFICER. The question is on agreeing to the motion.

The motion was agreed to.

The PRESIDING OFFICER. The clerk will report the nomination.

The legislative clerk read the nomination of Jennifer Sung, of Oregon, to be United States Circuit Judge for the Ninth Circuit.

CLOTURE MOTION

Mr. SCHUMER. Mr. President, I send a cloture motion to the desk.

The PRESIDING OFFICER. The cloture motion having been presented under rule XXII, the Chair directs the clerk to read the motion.

The legislative clerk read as follows:

CLOTURE MOTION

We, the undersigned Senators, in accordance with the provisions of rule XXII of the Standing Rules of the Senate, do hereby move to bring to a close debate on the nomination of Executive Calendar No. 533, Jennifer Sung, of Oregon, to be United States Circuit Judge for the Ninth Circuit.

Charles E. Schumer, Richard J. Durbin, Debbie Stabenow, Chris Van Hollen, Kirsten E. Gillibrand, Christopher A. Coons, Benjamin L. Cardin, Patty Murray, Alex Padilla, Tina Smith, Ben Ray Luján, Sheldon Whitehouse, Mazie K. Hirono, Elizabeth Warren, Jeff Merkley, Cory A. Booker, Brian Schatz.

LEGISLATIVE SESSION

Mr. SCHUMER. Mr. President, I move to proceed to legislative session.

The PRESIDING OFFICER. The question is on agreeing to the motion.

The motion was agreed to.

EXECUTIVE SESSION

EXECUTIVE CALENDAR

Mr. SCHUMER. Mr. President, I move to proceed to executive session to consider Calendar No. 576.

The PRESIDING OFFICER. The question is on agreeing to the motion.

The motion was agreed to.

The PRESIDING OFFICER. The clerk will report the nomination.

The legislative clerk read the nomination of Samantha D. Elliott, of New Hampshire, to be United States District Judge for the District of New Hampshire.

CLOTURE MOTION

Mr. SCHUMER. Mr. President, I send a cloture motion to the desk.

The PRESIDING OFFICER. The cloture motion having been presented under rule XXII, the Chair directs the clerk to read the motion.

The legislative clerk read as follows:

CLOTURE MOTION

We, the undersigned Senators, in accordance with the provisions of rule XXII of the Standing Rules of the Senate, do hereby move to bring to a close debate on the nomination of Executive Calendar No. 576 Samantha D. Elliott, of New Hampshire, to be United States District Judge for the District of New Hampshire.

Charles E. Schumer, Richard J. Durbin, Tina Smith, Martin Heinrich, Elizabeth Warren, Patty Murray, Tammy Duckworth, Tim Kaine, Gary C. Peters, Angus S. King, Jr., Brian Schatz, Margaret Wood Hassan, Jacky Rosen, Chris Van Hollen, Jeanne Shaheen, Christopher Murphy, Ron Wyden.

Mr. SCHUMER. I ask unanimous consent that the mandatory quorum calls for the cloture motions filed today, December 7, be waived.

The PRESIDING OFFICER. Without objection, it is so ordered.

LEGISLATIVE SESSION

Mr. SCHUMER. Mr. President, I move to proceed to legislative session.

The PRESIDING OFFICER. The question is on agreeing to the motion.

The motion was agreed to.

EXECUTIVE SESSION

EXECUTIVE CALENDAR

Mr. SCHUMER. Mr. President, I ask unanimous consent that the Senate proceed to executive session to consider the following nominations en bloc: Calendar No. 583, No. 584; that the Senate vote on the nominations en bloc without intervening action or debate; that the motions to reconsider be considered made and laid upon the table with no intervening action or debate; that any statements related to the nominations be printed in the RECORD; that the President be immediately notified of the Senate's action; and that the Senate resume legislative session.

The PRESIDING OFFICER. Without objection, it is so ordered.

The question is, Will the Senate advise and consent to the nominations of Brandon B. Brown, of Louisiana, to be United States Attorney for the Western District of Louisiana for the term of four years; and Ronald C. Gathe, Jr., of Louisiana, to be United States Attorney for the Middle District of Louisiana for the term of four years, en bloc?

The nominations were confirmed en bloc.

LEGISLATIVE SESSION

The PRESIDING OFFICER. The Senate will now resume legislative session.

BETTER CYBERCRIME METRICS ACT

Mr. SCHUMER. Mr. President, I ask unanimous consent that the Senate proceed to the immediate consideration of Calendar No. 173, S. 2629.

The PRESIDING OFFICER. The clerk will report the bill by title.

The senior assistant legislative clerk read as follows:

A bill (S. 2629) to establish cybercrime reporting mechanisms, and for other purposes.

There being no objection, the Senate proceeded to consider the bill.

Mr. SCHUMER. I further ask that the bill be considered read a third time and passed and that the motion to reconsider be considered made and laid upon the table with no intervening action or debate.

The PRESIDING OFFICER. Without objection, it is so ordered.

The bill (S. 2629) was ordered to be engrossed for a third reading, was read the third time, and passed, as follows:

S. 2629

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the ''Better Cybercrime Metrics Act''.

SEC. 2. FINDINGS.

Congress finds the following:

(1) Public polling indicates that cybercrime could be the most common crime in the United States.

(2) The United States lacks comprehensive cybercrime data and monitoring, leaving the country less prepared to combat cybercrime that threatens national and economic security.

(3) In addition to existing cybercrime vulnerabilities, the people of the United States and the United States have faced a heightened risk of cybercrime during the COVID–19 pandemic.

(4) Subsection (c) of the Uniform Federal Crime Reporting Act of 1988 (34 U.S.C. 41303(c)) requires the Attorney General to ''acquire, collect, classify, and preserve national data on Federal criminal offenses as part of the Uniform Crime Reports'' and requires all Federal departments and agencies that investigate criminal activity to ''report details about crime within their respective jurisdiction to the Attorney General in a uniform matter and on a form prescribed by the Attorney General''.

SEC. 3. CYBERCRIME TAXONOMY.

(a) IN GENERAL.—Not later than 90 days after the date of enactment of this Act, the Attorney General shall seek to enter into an agreement with the National Academy of Sciences to develop a taxonomy for the purpose of categorizing different types of cybercrime and cyber-enabled crime faced by individuals and businesses.

(b) DEVELOPMENT.—In developing the taxonomy under subsection (a), the National Academy of Sciences shall—

(1) ensure the taxonomy is useful for the Federal Bureau of Investigation to classify cybercrime in the National Incident-Based Reporting System, or any successor system;

(2) consult relevant stakeholders, including—

(A) the Cybersecurity and Infrastructure Security Agency of the Department of Homeland Security;

(B) Federal, State, and local law enforcement agencies;

(C) criminologists and academics;

(D) cybercrime experts; and

(E) business leaders; and

(3) take into consideration relevant taxonomies developed by non-governmental organizations, international organizations, academies, or other entities.

(c) REPORT.—Not later than 1 year after the date on which the Attorney General enters into an agreement under subsection (a), the National Academy of Sciences shall submit to the appropriate committees of Congress a report detailing and summarizing—

(1) the taxonomy developed under subsection (a); and

(2) any findings from the process of developing the taxonomy under subsection (a).

(d) AUTHORIZATION OF APPROPRIATIONS.—There are authorized to be appropriated to carry out this section $1,000,000.

SEC. 4. CYBERCRIME REPORTING.

(a) IN GENERAL.—Not later than 2 years after the date of enactment of this Act, the Attorney General shall establish a category in the National Incident-Based Reporting System, or any successor system, for the collection of cybercrime and cyber-enabled crime reports from Federal, State, and local officials.

(b) RECOMMENDATIONS.—In establishing the category required under subsection (a), the Attorney General shall, as appropriate, incorporate recommendations from the taxonomy developed under section 3(a).

SEC. 5. NATIONAL CRIME VICTIMIZATION SURVEY.

(a) IN GENERAL.—Not later than 540 days after the date of enactment of this Act, the Director of the Bureau of Justice Statistics, in coordination with the Director of the Bureau of the Census, shall include questions relating to cybercrime victimization in the National Crime Victimization Survey.

(b) AUTHORIZATION OF APPROPRIATIONS.—There are authorized to be appropriated to carry out this section $2,000,000.

SEC. 6. GAO STUDY ON CYBERCRIME METRICS.

Not later than 180 days after the date of enactment of this Act, the Comptroller General of the United States shall submit to Congress a report that assesses—

(1) the effectiveness of reporting mechanisms for cybercrime and cyber-enabled crime in the United States; and

(2) disparities in reporting data between—

(A) data relating to cybercrime and cyber-enabled crime; and

(B) other types of crime data.

PROVIDING FOR THE USE OF THE CATAFALQUE SITUATED IN THE EXHIBITION HALL OF THE CAPITOL VISITOR'S CENTER IN CONNECTION WITH MEMORIAL SERVICES TO BE CONDUCTED IN THE ROTUNDA OF THE CAPITOL FOR THE HONORABLE ROBERT JOSEPH DOLE, A SENATOR FROM THE STATE OF KANSAS

Mr. SCHUMER. Mr. President, I ask unanimous consent that the Senate proceed to the consideration of S. Con. Res. 22, which was submitted earlier today.

The PRESIDING OFFICER. The clerk will report the concurrent resolution by title.

The senior assistant legislative clerk read as follows:

A concurrent resolution (S. Con Res. 22) providing for the use of the catafalque situated in the Exhibition Hall of the Capitol Visitor Center in connection with memorial services to be conducted in the rotunda of the Capitol for the Honorable Robert Joseph Dole, a Senator from the State of Kansas.

There being no objection, the Senate proceeded to consider the concurrent resolution.

Mr. SCHUMER. I ask unanimous consent that the concurrent resolution be agreed to and that the motion to reconsider be considered made and laid upon the table with no intervening action or debate.

The PRESIDING OFFICER. Without objection, it is so ordered.

The concurrent resolution (S. Con. Res. 22) was agreed to.

(The concurrent resolution is printed in today's RECORD under ''Submitted Resolutions.'')

AUTHORIZING THE USE OF THE ROTUNDA OF THE CAPITOL FOR THE LYING IN STATE OF THE REMAINS OF THE HONORABLE ROBERT JOSEPH DOLE, A SENATOR FROM THE STATE OF KANSAS

Mr. SCHUMER. Mr. President, I ask unanimous consent that the Senate proceed to consideration of S. Con. Res. 23, submitted earlier today.

The PRESIDING OFFICER. Without objection, it is so ordered.

The clerk will report the concurrent resolution by title.

The senior assistant legislative clerk read as follows:

A concurrent resolution (S. Con. Res. 23) authorizing the use of the rotunda of the Capitol for the lying in state of the remains of the Honorable Robert Joseph Dole, a Senator from the State of Kansas.

There being no objection, the Senate proceeded to consider the concurrent resolution.

Mr. SCHUMER. I ask unanimous consent that the concurrent resolution be agreed to, and the motion to reconsider be considered made and laid upon the table with no intervening action or debate.

The PRESIDING OFFICER. Without objection, it is so ordered.

The concurrent resolution (S. Con. Res. 23) was agreed to.

(The concurrent resolution is printed in today's RECORD under ''Submitted Resolutions.'')

UNANIMOUS CONSENT AGREEMENT

Mr. SCHUMER. Mr. President, I ask unanimous consent that the Notice of Proposed Rulemaking from the Office of Congressional Workplace Rights be printed in the RECORD.

The PRESIDING OFFICER. Without objection, it is so ordered.

RECOGNIZING YOSHI'S CAFE

Mr. DURBIN. Mr. President, a famous chef once said that ''a plate of food was a plate of hope.'' At Yoshi's Cafe in Chicago, the meals were that—and so much more. Every meal—every bite—at Yoshi's was a celebration and a discovery of new tastes and new combinations of tastes.

When Yoshi's Cafe opened 39 years ago, it was on the vanguard of ''fusion cuisine,'' cooking that combines the best of different cultures. In Yoshi's case, it was an exquisite mix of classical French and Japanese cooking traditions. Over the years, Yoshi's also incorporated bits of cuisines, such as hint of Mexican cooking, into their dishes. But the true signature ingredients of any meal at Yoshi's Cafe were pride and love.

Every meal was a chance for founder Yoshi Katsumura to share his impeccable culinary skill and imagination. And every customer was treated like a friend. If you went often enough, as my wife Loretta and I have, you became part of the family. That combination of personal warmth and impeccable food has made Yoshi's Cafe one of Chicago's truly great neighborhood restaurants.

This weekend, Yoshi's Cafe will serve its last meal—and Loretta and I plan to be there. We wouldn't miss the chance to eat one last time at one of our favorite restaurants.

Chicagoans feared this day might come sooner. When founder Yoshi Katsumura died in 2015, we wondered if that might be the end of Yoshi's Cafe as well. But Yoshi asked his wife Nobuko to try to preserve his legacy and the business they had built together. And she did.

With the help of her son, chef Ken Katsumura, Nobuko kept Yoshi's Cafe open, even through a lethal pandemic that devastated the restaurant industry. Her daughter, Mari, has made a name for herself as a top-ranked pastry chef in Chicago.

After some soul-searching, however, Nobuko has decided that it's time for a new chapter—time to spend a little more time with her grandchildren and enjoying life.

Like countless other Chicagoans, Loretta and I feel a touch of sadness about the closing of Yoshi's Cafe. But we also feel tremendously grateful for the memorable meals we have enjoyed there and for the gift of Yoshi and Nobuko's friendship over the years.

I once showed up at the restaurant on a Monday evening, forgetting that it was closed. I stood for a moment on the sidewalk of North Halsted Street, stranded and hungry, trying to decide where to eat. Just as I was about to leave, I heard someone call my name.

It was Yoshi, who lived above the restaurant, calling down to me and offering to fix me a meal on his day off. That was the moment I came to see the goodness of this man. And Nobuko is just as kind and giving.

Yoshi's Cafe brought together the foods of Tokyo, Paris, Lyon, and Chicago. Yoshi was born in Japan. At the age of 20, he apprenticed under another legendary chef, Hiroyuki Sakai in Tokyo, where he first learned the intricacies of fine French cooking.

In 1973, he moved to Chicago, where he studied under one of Chicago' first

celebrity chefs, Jean Banchet, at Le Francais. Further study in Paris and Lyon added to his skills. He returned to Chicago as chef and partner in the city's premier French fusion restaurant, Jimmy's Place.

In 1982, he and Nobuko opened their own place. For nearly 40 years, Yoshi's has earned the love and loyalty of generation of Chicagoans. It has been featured on the Food Network and listed among ''America's Top Tables'' by the Conde Nast Gourmet magazine.

I want to thank Nobuko Katsumura and her gracious and loyal staff for the great gift Yoshi's has been to Chicago.

Loretta and I will miss our friends at Yoshi's and the incredible meals we enjoyed there. We will treasure our memories of this Chicago icon and the great family that created it for years to come.

VOTE EXPLANATION

Ms. SINEMA. Mr. President, I was necessarily absent, but had I been present I would have voted yes on rollcall No. 478, on the Motion to Invoke Cloture on Executive Calendar No. 567, Jessica Rosenworcel, to be a Member of the Federal Communications Commission.

80TH ANNIVERSARY OF PEARL HARBOR

Ms. BALDWIN. Mr. President, December 7 marks the 80th anniversary of the attack on Pearl Harbor, which thrust the United States of America into World War II. I rise today to pay tribute to those who served and sacrificed at Pearl Harbor and throughout World War II to defend our liberty and freedom.

The attack on Pearl Harbor killed 2,403 servicemembers and civilians and injured a further 1,178 people. Today, as we commemorate this anniversary, I want to share the story of the Barber brothers of New London, WI: Navy Fireman 1st Class Malcom J. Barber, 22; Navy Fireman 1st Class Leroy K. Barber, 21; and Navy Fireman 2nd Class Randolph H. Barber, 19.

The three Barber brothers all enlisted in the U.S. Navy in 1940, and together joined the crew of the USS Oklahoma as firemen, which was anchored at Ford Island, Pearl Harbor. When Pearl Harbor was attacked, the USS Oklahoma sustained multiple direct hits and capsized. Malcom, Leroy, and Randolph all died, as did 426 other crewmembers who were on board. Eventually, their remains were recovered, but could not be identified and were buried as unknown remains at the National Memorial Cemetery of the Pacific in Honolulu, HI.

Six years ago, the remains of 388 individuals were exhumed from the cemetery as part of a program launched by the Defense POW/MIA Accounting Agency—DPAA—which eventually was able to identify 355 individuals and allow their remains to be returned home. This past June, nearly 80 years after the attack on Pearl Harbor, the remains of the brothers were finally identified and returned home to New London. On September 11, 2021, the Barber brothers were buried with full military honors in their hometown of New London.

I am pleased that the brothers are finally home, and I am grateful for the work of those at the DPAA who worked to ensure that as many families as possible could receive closure and bring their family members home to rest. As we commemorate this solemn anniversary, I reflect on the service and sacrifice of 320,000 Wisconsinites who served in World War II and honor their contributions in defense of our Nation today and always.

NATIONAL PEARL HARBOR REMEMBRANCE DAY AND HONORING THE TANKERS OF MAYWOOD, ILLINOIS

Ms. DUCKWORTH. Mr. President, I rise today on Pearl Harbor Day to remind my colleagues that on December 7, 1941, Imperial Japan attacked not only Pearl Harbor but also the Philippine Islands, Guam, Wake Island, Howland Island, Midway, Malaya, Singapore, Hong Kong, Shanghai, and Bangkok.

In the Philippines that day, 89 men from Maywood, IL, who made up Company ''B'' of the 192nd Tank Battalion—federated National Guard units from Illinois, Wisconsin, Kentucky, and Ohio—defended Clark Field from invading Japanese forces. They had arrived in the Philippines less than 3 weeks earlier.

These Illinois tankers watched helplessly as Japan's modern planes flew beyond the reach of their guns and destroyed the airfield. They then fought valiantly on the Bataan Peninsula with antiquated weapons and dwindling supplies. Relief from the United States never came. Though they held out for months, the men, overcome with fatigue, starvation, and disease, were surrendered by their commanders on April 9, 1942.

What followed was the infamous Bataan Death March 100 miles up the peninsula to a makeshift prison camp. Thousands died. Maywood, a hamlet outside of Chicago, had the greatest number of men from any single American town on the Death March. They would not all make it home.

Those who survived the initial march endured 3 and a half years of death camps, brutal forced labor, and unimaginable abuse. More than half the Americans taken prisoner on Bataan died before they could see the war's end. Of the 89 Maywood men of Company ''B'' who left the U.S. in 1941, only 43 returned home in 1945.

For 79 years, Maywood has celebrated and remembered its heroes of Bataan with an annual September Memorial. Like many important celebrations in COVID, this was the second year that the memorial had to be postponed. But we do not forget the men of Maywood. From the Bataan-Corregidor Memorial Bridge in Chicago to Maywood's Bataan Memorial Park, my home State of Illinois recalls daily their sacrifice for liberty.

As a retired member of the Illinois National Guard myself, today is a solemn day—a day that will forever live in infamy—when we are reminded of the sacrifices made and the brave lives lost in service to our Nation. I am proud to have served with my Illinois National Guard family and work to continue to bring respect, remembrance, and honor to such a strong legacy.

Therefore, I ask my fellow Senators to join me on this 80th anniversary of Japan's surprise attack on Pearl Harbor and to remember the other Americans who fought and died throughout the Pacific that day. Although the aim of the December 7 surprise attack on Hawaii's Pearl Harbor was to destroy the U.S. Pacific Fleet in its home port and to discourage U.S. action in Asia, the other strikes served as preludes to full-scale invasion and brutal military occupation.

I further ask my colleagues to join me in commending the hard work and dedication of Maywood Bataan Day Organization President Col. Richard A. McMahon, Jr., and his board of directors, as well as Ms. Jan Thompson, president of the Illinois-based American Defenders of Bataan and Corregidor Memorial Society, who are committed to honoring and preserving the history of the men and women of Bataan who gave so much in the fight against tyranny and fascism. They, too, are the part of the story of Pearl Harbor Day and in keeping the memory of the men of Maywood alive to this day.

TRIBUTE TO CARL LEOGRANDE

Mr. BLUMENTHAL. Mr. President, today I rise to recognize Mr. Carl Leogrande, a remarkable man and World War II veteran who turns 100 on January 3, 2022.

Following the invasion of Normandy, Mr. Leogrande served as a tank driver for the 12th Armored Division. After his tank was hit with artillery, Mr. Leogrande was transferred to the medical unit. While there, he efficiently deployed his first aid training from his days as a Boy Scout. This methodical, effective work earned Mr. Leogrande the attention of an officer. Soon, he received warfront training and was quickly assigned as a medic on the front lines.

Mr. Leogrande's division pushed eastward. Along the way, they passed concentration camps that were being liberated by other units. The indescribable sights and smells left Mr. Leogrande with trauma that he speaks of to this day.

At the age of 22, Mr. Leogrande returned home unharmed. Not long after,

he went on a blind date with a young woman named Annabelle. She ended up becoming the love of his life, and the two married a year and a half later.

In the 1970s, Mr. and Mrs. Leogrande moved to Mystic, CT, which they would call their home for the rest of their lives. They became proud member-owners of the Steamboat Wharf Condominium Association. The two were married for over five and a half decades, until Mrs. Leogrande passed away in 2003.

Mr. Leogrande continues to attend every reunion of the 12th Armored Division. Though 782 members were lost during the war, 14 of them still remain, and Mr. Leogrande looks forward to joining his fellow soldiers for their 2022 reunion, which will take place in Texas.

Mr. Leogrande's tireless service will be an enduring legacy. I applaud his many accomplishments and hope my colleagues will join me in congratulating Mr. Carl Leogrande on this milestone of his 100th birthday.

RECOGNIZING THE 433RD FIGHTER WEAPONS SQUADRON

Mr. COTTON. Mr. President, I rise today to acknowledge and honor the 433rd Fighter Weapons Squadron, which began providing advanced instructor training to experienced F–15 pilots on January 3, 1978, as part of the USAF Fighter Weapons School. The 433rd Fighter Weapons Squadron was deactivated on June 1, 1981, and designated the U.S. Air Force Fighter Weapons School, F–15 Division. On February 3, 2003, the 433rd was reactivated and designated the 433rd Weapons Squadron, once again retaining its informal name, ''The Barnyard.'' Though the squadron name has changed over the last 43 years, the tradition established by the individuals of the institution has remained consistent.

December 11, 2021, is graduation day for the pilots of the F–15 Barnyard, bringing the total to 511 F–15 patch wearers. That is 511 individuals who, over the last 43 years, have shouldered the burden of responsibility in training and preparing America's fighting force to go to war in the F–15 air superiority fighter. They are the pilots who have flown on the front lines of aerial combat when called upon by their nation. They are the warriors who lead their wingmen safely home. The graduates of the F–15 division have collectively preserved the Eagle's undefeated record in combat, suffering no losses during its time in service. Twelve of the F–15 Weapons School graduates account for 18 of the F–15's 38 air-to-air victories.

It is no surprise that those who have passed through the 433rd Weapons Squadron, F–15 Division have gone on to do great things and achieve high-ranking positions, in and out of the military. The tradition of the F–15 Division is rooted in the never-ending pursuit of excellence in aerial combat. Throughout their history, the fighter pilots of the Eagle Division have devoted themselves to a worthy cause with enthusiasm, devotion, and discipleship. They have trained and led the pilots who have enabled air supremacy for our forces around the world and in numerous conflicts.

The fighter pilots of the 433rd Weapons Squadron, F–15 Division join a long lineage that has ensured air superiority for our Nation. From DESERT STORM, to ALLIED FORCE, to SOUTHERN and NORTHERN WATCH, and IRAQI FREEDOM, the fighter pilots of the F–15 Division of the Weapons School have ensured that control of the skies is never in question. The 433rd Weapons Squadron, F–15 Division has stood on the shoulders of the giants and dared to reach higher. It has established itself in the history of this great Nation and its contributions to national defense are highly commendable. Their brave pilots now pass the torch to the next generation of air superiority warriors.

TRIBUTE TO BETTY EMERSON

Mr. TILLIS. Mr. President, I rise today to recognize Betty Emerson, who is retiring as the congressional liaison for North Carolina's Disability Determination Services. Ms. Emerson has served the North Carolina Department of Health and Human Services for over 32 years, and her service to North Carolina is greatly appreciated.

Ms. Emerson began her career at the North Carolina Department of Health and Human Services as a unit office assistant. She then served as a backup to the medical and congressional liaison, and finally, as the congressional liaison for the North Carolina Disability Determination Services. She has consistently gone above and beyond the call of duty to assist North Carolina's citizens.

During her 12 years as congressional liaison, Ms. Emerson developed incredibly strong relationships across the State. Her career exemplified the highest standard of excellence, and I am incredibly grateful for the exceptional service she consistently provided to the staff in my North Carolina offices on behalf of our citizens.

I wish Ms. Emerson all the best for happiness and good health in the years ahead.

ADDITIONAL STATEMENTS

TRIBUTE TO DR JOYCE TURNER KELLER

● Mr. CASSIDY. Mr. President, I rise today to recognize and thank Dr. Joyce Turner Keller and her organization Aspirations for 20 years in the fight to end HIV/AIDS.

Aspirations' mission is to serve the needs of hurting people, regardless of race, creed, gender, age, or social class affected by the HIV/AIDS virus. Established in 2001, they have provided a much needed service to our region by providing free testing, education, support groups, and numerous other options to those who are fighting this virus. Its founder, Dr. Joyce Turner Keller, has made it her life's mission to be a face of the invisible that are living and surviving with HIV/AIDS.

As a doctor, I treated uninsured HIV/AIDS patients and saw firsthand the pain this disease can cause. Dr. Joyce Turner Keller has used her God-given talents to care for the underserved and the stigmatized. I commend her on her work and the work of Aspirations these last 20 years.●

TRIBUTE TO JOHN DUMAIS

● Mrs. SHAHEEN. Mr. President, I rise today to salute John Dumais for his many years of dedicated service at the New Hampshire Grocers Association. John is retiring from his longtime role as president and CEO of a trade association that represents hundreds of retailers and suppliers and thousands of workers across the Granite State, and he leaves a legacy worthy of our praise and our gratitude.

John draws on a lifetime of experience and in-depth knowledge in his advocacy for the retail food industry. He grew up working in his family's grocery store in Franklin, NH—Surowiec's Market—and put aside a career track as a pharmacist to help run the shop when his father passed away in 1971. Three years later, he took a role with the New Hampshire Grocers Association. It was the start of an almost five-decade career in which John became one of the State's foremost authorities on the many issues that impact New Hampshire's chained grocery stores and independent retailers.

The Granite State is home to a growing number of retail food chains that offer their services in multiple locations. It boasts a number of independent, local corner stores and specialty shops that provide distinct services to their communities. It also has a number of food manufacturers, brokers, wholesalers, and distributers that serve and support the State's many retailers. Each of these enterprises are represented by the New Hampshire Grocers Association, and each of them has found a knowledgeable resource and skilled advocate in John Dumais. John and his hard-working team tap into their wealth of experience to respond to present needs and anticipate future challenges in this crucial industry.

In addition to his influential role and many achievements with the New Hampshire Grocers Association, John is incredibly generous with his time in a number of other community and charitable organizations. He is a past chairman and current board member of the New Hampshire Food Bank, the chairman of an anti-litter and pro-recycling campaign—New Hampshire the Beautiful—and the past chairman of a scholarship organization, the Asparagus Club. He is also a donor-adviser to

the Mary M. Dumais Memorial Fund, an endowment fund named for his wife that assists women who face challenges entering or advancing in the workforce. John's enthusiasm and desire to tackle serious community issues reveal a deep understanding of the true value of service and reflect the profound sense of community that defines our State.

I have known John for decades. As State senator, Governor of New Hampshire, and now U.S. Senator, I have crossed paths with him at many meetings and events around the State, including just last month at a supply chain event in Manchester. I always welcome his perspective and advice on ways we can strengthen the retail food industry. His wisdom was especially vital in the past year and a half as the industry navigated the challenges of a global pandemic and Granite Staters counted on grocery stores to keep food on their tables. We relied on this essential workforce, just as these retailers relied on John for guidance through tough times.

On behalf of the people of New Hampshire, I ask my colleagues and all Americans to join me in thanking John Dumais for his years of service and advocacy and wishing him all the best in the years ahead.●

MESSAGES FROM THE PRESIDENT

Messages from the President of the United States were communicated to the Senate by Mr. Swann, one of his secretaries.

EXECUTIVE MESSAGES REFERRED

In executive session the Presiding Officer laid before the Senate messages from the President of the United States submitting sundry nominations and a withdrawal which were referred to the appropriate committees.

(The messages received today are printed at the end of the Senate proceedings.)

MESSAGES FROM THE HOUSE

At 12:23 p.m., a message from the House of Representatives, delivered by Mrs. Alli, one of its reading clerks, announced that the House has passed the following bill, in which it requests the concurrence of the Senate:

H.R. 2930. An act to enhance protections of Native American tangible cultural heritage, and for other purposes.

At 9:45 p.m., a message from the House of Representatives, delivered by Mrs. Cole, one of its reading clerks, announced that the House has passed the following bill, with an amendment, in which it requests the concurrence of the Senate:

S. 610. An act to address behavioral health and well-being among health care professionals.

EXECUTIVE AND OTHER COMMUNICATIONS

The following communications were laid before the Senate, together with accompanying papers, reports, and documents, and were referred as indicated:

EC–2762. A communication from the Chairman of the Board of Governors, Federal Reserve System, transmitting, pursuant to law, a report on the remaining obstacles to the efficient and timely circulation of $1 coins; to the Committee on Banking, Housing, and Urban Affairs.

EC–2763. A communication from the Sanctions Regulations Advisor, Office of Foreign Assets Control, Department of the Treasury, transmitting, pursuant to law, the report of a rule entitled ''Syrian Sanctions Regulations'' (31 CFR Part 542) received in the Office of the President of the Senate on November 30, 2021; to the Committee on Banking, Housing, and Urban Affairs.

EC–2764. A communication from the Director of Legislative Affairs, Federal Deposit Insurance Corporation, transmitting, pursuant to law, the report of a rule entitled ''Computer-Security Incident Notification Requirements for Banking Organizations and Their Bank Service Providers'' (RIN3064–AF59) received in the Office of the President of the Senate on November 30, 2021; to the Committee on Banking, Housing, and Urban Affairs.

EC–2765. A communication from the Associate Director of the Regulatory Management Division, Environmental Protection Agency, transmitting, pursuant to law, the report of a rule entitled ''Additional Revised Air Quality Designations for the 2015 Ozone National Ambient Air Quality Standards: El Paso County, Texas and Weld County, Colorado'' (FRL No. 8260.1–02–OAR) received in the Office of the President of the Senate on November 30, 2021; to the Committee on Environment and Public Works.

EC–2766. A communication from the Associate Director of the Regulatory Management Division, Environmental Protection Agency, transmitting, pursuant to law, the report of a rule entitled ''Louisiana: Incorporation by Reference of Approved State Hazardous Waste Management Program'' (FRL No. 9240–02–R6) received in the Office of the President of the Senate on November 30, 2021; to the Committee on Environment and Public Works.

EC–2767. A communication from the Associate Director of the Regulatory Management Division, Environmental Protection Agency, transmitting, pursuant to law, the report of a rule entitled ''Partial Approval and Partial Disapproval of Air Quality Implementation Plans; California; San Joaquin Valley Serious Area and Section 189(d) Plan for Attainment of the 1997 annual PM2.5 NAAQS'' (FRL No. 8644–01–R9) received in the Office of the President of the Senate on November 30, 2021; to the Committee on Environment and Public Works.

EC–2768. A communication from the Associate Director of the Regulatory Management Division, Environmental Protection Agency, transmitting, pursuant to law, the report of a rule entitled ''Clean Air Plans; California; San Joaquin Valley Moderate Area Plan and Reclassification as Serious Nonattainment for the 2012 PM2.5 NAAQS; Contingency Measures for the 2006 PM2.5 NAAQS'' (FRL No. 8846–02–R9) received in the Office of the President of the Senate on November 30, 2021; to the Committee on Environment and Public Works.

EC–2769. A communication from the Associate Director of the Regulatory Management Division, Environmental Protection Agency, transmitting, pursuant to law, the report of a rule entitled ''Addition of Natural Gas Processing Facilities to the Toxics Release Inventory'' (FRL No. 5879–02–OCSPP) received in the Office of the President of the Senate on November 30, 2021; to the Committee on Environment and Public Works.

EC–2770. A communication from the Regulations Writer, Office of Regulations and Reports Clearance, Social Security Administration, transmitting, pursuant to law, the report of a rule entitled ''Extension of Expiration Dates for Three Body System Listings'' (RIN0960–AI56) received in the Office of the President of the Senate on November 30, 2021; to the Committee on Finance.

EC–2771. A communication from the Branch Chief of the Legal Processing Division, Internal Revenue Service, Department of the Treasury, transmitting, pursuant to law, the report of a rule entitled ''Homeowner Assistance Fund safe harbor'' (Rev. Proc. 2021–47) received in the Office of the President of the Senate on November 30, 2021; to the Committee on Finance.

EC–2772. A communication from the Secretary of Health and Human Services, transmitting, pursuant to law, a report entitled ''Fiscal Year 2020 Review of Medicare's Program for Oversight of Accrediting Organizations and the Clinical Laboratory Improvement Validation Program''; to the Committee on Finance.

INTRODUCTION OF BILLS AND JOINT RESOLUTIONS

The following bills and joint resolutions were introduced, read the first and second times by unanimous consent, and referred as indicated:

By Ms. KLOBUCHAR (for herself and Ms. SMITH):

S. 3319. A bill to designate the facility of the United States Postal Service located at 155 Main Avenue West in Winsted, Minnesota, as the ''James A. Rogers Jr. Post Office''; to the Committee on Homeland Security and Governmental Affairs.

By Ms. KLOBUCHAR (for herself and Ms. SMITH):

S. 3320. A bill to designate the facility of the United States Postal Service located at 100 3rd Avenue Northwest in Perham, Minnesota, as the ''Charles P. Nord Post Office''; to the Committee on Homeland Security and Governmental Affairs.

By Ms. KLOBUCHAR (for herself and Ms. SMITH):

S. 3321. A bill to designate the facility of the United States Postal Service located at 317 Blattner Drive in Avon, Minnesota, as the ''W.O.C. Kort Miller Plantenberg Post Office''; to the Committee on Homeland Security and Governmental Affairs.

By Mr. CRUZ:

S. 3322. A bill to require the imposition of sanctions with respect to Nord Stream 2 AG; to the Committee on Banking, Housing, and Urban Affairs.

By Mr. CRAMER (for himself and Mr. BLUMENTHAL):

S. 3323. A bill to require the Secretary of Veterans Affairs to make certain improvements to the Veterans Justice Outreach Program, and for other purposes; to the Committee on Veterans' Affairs.

By Mr. BLUMENTHAL:

S. 3324. A bill to establish requirements for quality and discard dates that are, at the option of food labelers, included in food packaging, and for other purposes; to the Committee on Health, Education, Labor, and Pensions.

By Mrs. BLACKBURN (for herself, Ms. CORTEZ MASTO, Mr. HAGERTY, Ms. KLOBUCHAR, and Mr. WARNOCK):

S. 3325. A bill to make companies that support venues and events eligible for grants under the shuttered venue operators grant program, and for other purposes; to the Committee on Small Business and Entrepreneurship.

By Mr. HAWLEY:

S. 3326. A bill to modify Department of Defense printed circuit board acquisition restrictions, and for other purposes; to the Committee on Armed Services.

By Mr. MARKEY (for himself, Mr. MANCHIN, Mr. BROWN, and Mr. DURBIN):

S. 3327. A bill to amend the Controlled Substances Act to require the Attorney General to make procurement quotas for opioid analgesics publicly available, and for other purposes; to the Committee on the Judiciary.

By Ms. SMITH (for herself and Mr. LUJÁN):

S. 3328. A bill to amend the Indian Civil Rights Act of 1968 to extend the jurisdiction of tribal courts to cover crimes involving sexual violence, and for other purposes; to the Committee on Indian Affairs.

By Mr. CORNYN (for himself, Mr. HEINRICH, and Ms. SINEMA):

S. 3329. A bill to reauthorize the U.S. Customs and Border Protection Donations Acceptance Program and for other purposes; to the Committee on Homeland Security and Governmental Affairs.

By Mr. WARNER (for himself, Mrs. FISCHER, Ms. KLOBUCHAR, and Mr. THUNE):

S. 3330. A bill to prohibit the use of exploitative and deceptive practices by large online operators and to promote consumer welfare in the use of behavioral research by such providers; to the Committee on Commerce, Science, and Transportation.

By Mr. PETERS (for himself, Mr. PORTMAN, Mrs. BLACKBURN, and Mr. KELLY):

S. 3331. A bill to amend the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021 to improve the semiconductor incentive program of the Department of Commerce; to the Committee on Commerce, Science, and Transportation.

By Mr. BRAUN (for himself, Mrs. BLACKBURN, Mr. ROMNEY, Mr. YOUNG, Mr. INHOFE, and Mr. HAGERTY):

S. 3332. A bill to amend title XI of the Social Security Act to allow States to promote Medicaid objectives through work or community engagement requirements; to the Committee on Finance.

SUBMISSION OF CONCURRENT AND SENATE RESOLUTIONS

The following concurrent resolutions and Senate resolutions were read, and referred (or acted upon), as indicated:

By Mr. SHELBY (for himself and Mr. TUBERVILLE):

S. Res. 471. A resolution commemorating the 100th anniversary of the Alabama Farmers Federation and celebrating the long history of the Alabama Farmers Federation serving as the voice for Alabama agriculture and forestry; to the Committee on Agriculture, Nutrition, and Forestry.

By Mr. MENENDEZ (for himself, Mr. RUBIO, Mr. CARDIN, and Mr. CASSIDY):

S. Res. 472. A resolution reaffirming the partnership between the United States and the Dominican Republic and advancing opportunities to deepen diplomatic, economic, and security cooperation between the two nations; to the Committee on Foreign Relations.

By Ms. KLOBUCHAR (for herself, Mr. BLUNT, Mr. SCHUMER, and Mr. MCCONNELL):

S. Con. Res. 22. A concurrent resolution providing for the use of the catafalque situated in the Exhibition Hall of the Capitol Visitor Center in connection with memorial services to be conducted in the rotunda of the Capitol for the Honorable Robert Joseph Dole, a Senator from the State of Kansas; considered and agreed to.

By Ms. KLOBUCHAR (for herself, Mr. BLUNT, Mr. SCHUMER, and Mr. MCCONNELL):

S. Con. Res. 23. A concurrent resolution authorizing the use of the rotunda of the Capitol for the lying in state of the remains of the Honorable Robert Joseph Dole, a Senator from the State of Kansas; considered and agreed to.

ADDITIONAL COSPONSORS

S. 56

At the request of Ms. KLOBUCHAR, the name of the Senator from New Mexico (Mr. HEINRICH) was added as a cosponsor of S. 56, a bill to amend the Public Health Service Act to authorize grants for training and support services for families and caregivers of people living with Alzheimer's disease or a related dementia.

S. 411

At the request of Mr. DURBIN, the name of the Senator from Maine (Mr. KING) was added as a cosponsor of S. 411, a bill to improve Federal efforts with respect to the prevention of maternal mortality, and for other purposes.

S. 586

At the request of Mrs. CAPITO, the names of the Senator from Louisiana (Mr. KENNEDY) and the Senator from Connecticut (Mr. BLUMENTHAL) were added as cosponsors of S. 586, a bill to amend title XVIII of the Social Security Act to combat the opioid crisis by promoting access to non-opioid treatments in the hospital outpatient setting.

S. 678

At the request of Mr. INHOFE, the name of the Senator from Arkansas (Mr. BOOZMAN) was added as a cosponsor of S. 678, a bill to declare English as the official language of the United States, to establish a uniform English language rule for naturalization, and to avoid misconstructions of the English language texts of the laws of the United States, pursuant to Congress' powers to provide for the general welfare of the United States and to establish a uniform rule of naturalization under article I, section 8, of the Constitution.

S. 697

At the request of Ms. ROSEN, the names of the Senator from Colorado (Mr. HICKENLOOPER) and the Senator from Pennsylvania (Mr. CASEY) were added as cosponsors of S. 697, a bill to require the Secretary of the Treasury to mint commemorative coins in recognition of the Bicentennial of Harriet Tubman's birth.

S. 797

At the request of Mr. SCHATZ, the names of the Senator from West Virginia (Mrs. CAPITO) and the Senator from Colorado (Mr. HICKENLOOPER) were added as cosponsors of S. 797, a bill to require transparency, accountability, and protections for consumers online.

S. 864

At the request of Mr. KAINE, the name of the Senator from Louisiana (Mr. KENNEDY) was added as a cosponsor of S. 864, a bill to extend Federal Pell Grant eligibility of certain short-term programs.

S. 1089

At the request of Mrs. BLACKBURN, the name of the Senator from Indiana (Mr. YOUNG) was added as a cosponsor of S. 1089, a bill to direct the Government Accountability Office to evaluate appropriate coverage of assistive technologies provided to patients who experience amputation or live with limb difference.

S. 1532

At the request of Mr. KAINE, the name of the Senator from Delaware (Mr. COONS) was added as a cosponsor of S. 1532, a bill to provide a work opportunity tax credit for military spouses and to provide for flexible spending arrangements for childcare services for uniformed services families.

S. 1548

At the request of Mr. LUJÁN, the names of the Senator from Arkansas (Mr. BOOZMAN) and the Senator from Louisiana (Mr. CASSIDY) were added as cosponsors of S. 1548, a bill to amend the Public Health Service Act to improve the diversity of participants in research on Alzheimer's disease, and for other purposes.

S. 1596

At the request of Mr. ROUNDS, the names of the Senator from Arizona (Mr. KELLY), the Senator from Iowa (Mr. GRASSLEY), and the Senator from West Virginia (Mr. MANCHIN) were added as cosponsors of S. 1596, a bill to require the Secretary of the Treasury to mint coins in commemoration of the National World War II Memorial in Washington, DC, and for other purposes.

S. 1748

At the request of Mr. MENENDEZ, the name of the Senator from North Carolina (Mr. BURR) was added as a cosponsor of S. 1748, a bill to modify the prohibition on recognition by United States courts of certain rights relating to certain marks, trade names, or commercial names.

S. 1813

At the request of Mr. COONS, the name of the Senator from North Carolina (Mr. BURR) was added as a cosponsor of S. 1813, a bill to direct the Secretary of Health and Human Services to support research on, and expanded access to, investigational drugs for amyotrophic lateral sclerosis, and for other purposes.

S. 1858

At the request of Mr. MURPHY, the name of the Senator from New Mexico

(Mr. LUJÁN) was added as a cosponsor of S. 1858, a bill to prohibit and prevent seclusion, mechanical restraint, chemical restraint, and dangerous restraints that restrict breathing, and to prevent and reduce the use of physical restraint in schools, and for other purposes.

S. 1874

At the request of Mr. WYDEN, the name of the Senator from New Mexico (Mr. LUJÁN) was added as a cosponsor of S. 1874, a bill to promote innovative approaches to outdoor recreation on Federal land and to increase opportunities for collaboration with non-Federal partners, and for other purposes.

S. 1909

At the request of Mr. TESTER, the name of the Senator from Iowa (Ms. ERNST) was added as a cosponsor of S. 1909, a bill to amend title XVIII of the Social Security Act to reform requirements with respect to direct and indirect remuneration under Medicare part D, and for other purposes.

S. 1936

At the request of Mr. BOOKER, the name of the Senator from Arizona (Ms. SINEMA) was added as a cosponsor of S. 1936, a bill to amend title 38, United States Code, to provide for extensions of the time limitations for use of entitlement under Department of Veterans Affairs educational assistance programs by reason of school closures due to emergency and other situations, and for other purposes.

S. 1958

At the request of Mrs. MURRAY, the name of the Senator from California (Mr. PADILLA) was added as a cosponsor of S. 1958, a bill to amend the Public Health Service Act to reauthorize the program of payments to teaching health centers that operate graduate medical education programs.

S. 2103

At the request of Mr. PADILLA, the names of the Senator from Illinois (Mr. DURBIN), the Senator from California (Mrs. FEINSTEIN), the Senator from Vermont (Mr. SANDERS), the Senator from Massachusetts (Mr. MARKEY), the Senator from Massachusetts (Ms. WARREN), and the Senator from Oregon (Mr. WYDEN) were added as cosponsors of S. 2103, a bill to amend the Revised Statutes of the United States to hold certain public employers liable in civil actions for deprivation of rights, and for other purposes.

S. 2305

At the request of Mr. OSSOFF, the name of the Senator from Arkansas (Mr. BOOZMAN) was added as a cosponsor of S. 2305, a bill to enhance cybersecurity education.

S. 2609

At the request of Mrs. BLACKBURN, the name of the Senator from Alaska (Mr. SULLIVAN) was added as a cosponsor of S. 2609, a bill to amend title XVIII of the Social Security Act to ensure equitable payment for, and preserve Medicare beneficiary access to, diagnostic radiopharmaceuticals under the Medicare hospital outpatient prospective payment system.

S. 2612

At the request of Mr. LUJÁN, the name of the Senator from Arkansas (Mr. BOOZMAN) was added as a cosponsor of S. 2612, a bill to amend title XVIII of the Social Security Act to add physical therapists to the list of providers allowed to utilize locum tenens arrangements under Medicare.

S. 2629

At the request of Mr. SCHATZ, the name of the Senator from California (Mrs. FEINSTEIN) was added as a cosponsor of S. 2629, a bill to establish cybercrime reporting mechanisms, and for other purposes.

S. 2676

At the request of Mr. TESTER, the name of the Senator from Maine (Mr. KING) was added as a cosponsor of S. 2676, a bill to amend the Public Health Service Act to provide for the participation of physical therapists in the National Health Service Corps Loan Repayment Program, and for other purposes.

S. 2720

At the request of Mr. MORAN, the name of the Senator from Tennessee (Mrs. BLACKBURN) was added as a cosponsor of S. 2720, a bill to direct the Secretary of Veterans Affairs to establish a national clinical pathway for prostate cancer, and for other purposes.

S. 2798

At the request of Mr. LUJÁN, the name of the Senator from New York (Mrs. GILLIBRAND) was added as a cosponsor of S. 2798, a bill to amend the Radiation Exposure Compensation Act to improve compensation for workers involved in uranium mining, and for other purposes.

S. 2937

At the request of Mr. CARDIN, the name of the Senator from Pennsylvania (Mr. CASEY) was added as a cosponsor of S. 2937, a bill to authorize humanitarian assistance and civil society support, promote democracy and human rights, and impose targeted sanctions with respect to human rights abuses in Burma, and for other purposes.

S. 2960

At the request of Mr. MERKLEY, the name of the Senator from California (Mrs. FEINSTEIN) was added as a cosponsor of S. 2960, a bill to encourage reduction of disposable plastic products in units of the National Park System, and for other purposes.

S. 3092

At the request of Mr. PADILLA, the name of the Senator from Nevada (Ms. ROSEN) was added as a cosponsor of S. 3092, a bill to amend the Robert T. Stafford Disaster Relief and Emergency Assistance Act to improve the provision of certain disaster assistance, and for other purposes.

S. 3143

At the request of Ms. ERNST, the name of the Senator from Wyoming (Ms. LUMMIS) was added as a cosponsor of S. 3143, a bill to amend title 9 of the United States Code to prohibit the enforcement of predispute arbitration agreements with respect to claims of sexual assault and to ensure that fair procedures are used in arbitrations involving sexual harassment claims.

S. 3192

At the request of Mr. RISCH, the name of the Senator from Texas (Mr. CRUZ) was added as a cosponsor of S. 3192, a bill to advance a policy to ensure peace and security across the Taiwan Strait.

S. 3210

At the request of Mr. WARNOCK, the names of the Senator from Oregon (Mr. WYDEN) and the Senator from Connecticut (Mr. BLUMENTHAL) were added as cosponsors of S. 3210, a bill to amend title 38, United States Code, to extend to Black veterans of World War II, and surviving spouses and certain direct descendants of such veterans, eligibility for certain housing loans and educational assistance administered by the Secretary of Veterans Affairs, and for other purposes.

S. 3253

At the request of Mr. COTTON, the name of the Senator from Arkansas (Mr. BOOZMAN) was added as a cosponsor of S. 3253, a bill to amend the Family and Medical Leave Act of 1993 to provide leave for the spontaneous loss of an unborn child, and for other purposes.

S. 3254

At the request of Mr. MERKLEY, the name of the Senator from Illinois (Mr. DURBIN) was added as a cosponsor of S. 3254, a bill to provide grants to local educational agencies to help public schools reduce class size in the early elementary grades, and for other purposes.

S. 3300

At the request of Mr. TILLIS, the name of the Senator from Mississippi (Mrs. HYDE-SMITH) was added as a cosponsor of S. 3300, a bill to prohibit the payment of certain legal settlements to individuals who unlawfully entered the United States.

S. 3301

At the request of Mr. RUBIO, the name of the Senator from Tennessee (Mrs. BLACKBURN) was added as a cosponsor of S. 3301, a bill to prohibit discrimination on the basis of mental or physical disability in cases of organ transplants.

S. 3310

At the request of Mr. BROWN, the name of the Senator from Virginia (Mr. WARNER) was added as a cosponsor of S. 3310, a bill to direct the Secretary of Defense to develop a plan to establish the Minority Institute for Defense Research, and for other purposes.

SUBMITTED RESOLUTIONS

SENATE RESOLUTION 471—COMMEMORATING THE 100TH ANNIVERSARY OF THE ALABAMA FARMERS FEDERATION AND CELEBRATING THE LONG HISTORY OF THE ALABAMA FARMERS FEDERATION SERVING AS THE VOICE FOR ALABAMA AGRICULTURE AND FORESTRY

Mr. SHELBY (for himself and Mr. TUBERVILLE) submitted the following resolution; which was referred to the Committee on Agriculture, Nutrition, and Forestry:

S. RES. 471

Whereas, created by farmers, led by farmers, and dedicated to serving farmers, the Alabama Farmers Federation was founded in 1921;

Whereas the Alabama Farmers Federation founded Alfa Insurance in 1946 to provide quality and affordable fire insurance to federation members and has worked to expand coverage to more than 1,000,000 customers in 11 States;

Whereas the Alabama Farmers Federation, with more than 360,000 members and 67 county Farmers Federations, has grown to become the largest farmer-led organization in the State of Alabama;

Whereas the mission of the Alabama Farmers Federation is ''to serve farmers by promoting the economic, social and educational interests of all Alabamians'';

Whereas the Alabama Farmers Federation fulfills that mission—

(1) by representing farm and forestry families of Alabama for the purpose of formulating action to support agriculture, forestry, and rural communities;

(2) by improving agricultural production, education, leadership development, marketing, and public policy; and

(3) by promoting the well-being of the people of the State of Alabama;

Whereas the Alabama Farmers Federation has represented the interests of farmers with respect to the consideration and enactment of all major legislation impacting farmers since the founding of the Alabama Farmers Federation; and

Whereas the Alabama Farmers Federation plays a vital role in promoting the well-being of the people of Alabama—

(1) by analyzing issues faced by farm and forestry families; and

(2) by formulating action to achieve the goals of farm and forestry families: Now, therefore, be it

Resolved, That the Senate—

(1) commemorates the 100th anniversary of the Alabama Farmers Federation;

(2) recognizes the Alabama Farmers Federation for 100 years of promoting farm and forestry interests for the benefit of the people of the State of Alabama; and

(3) applauds the Alabama Farmers Federation for its past, present, and future efforts to advocate for agricultural and forestry interests that are critical to the State of Alabama.

SENATE RESOLUTION 472—REAFFIRMING THE PARTNERSHIP BETWEEN THE UNITED STATES AND THE DOMINICAN REPUBLIC AND ADVANCING OPPORTUNITIES TO DEEPEN DIPLOMATIC, ECONOMIC, AND SECURITY COOPERATION BETWEEN THE TWO NATIONS

Mr. MENENDEZ (for himself, Mr. RUBIO, Mr. CARDIN, and Mr. CASSIDY) submitted the following resolution; which was referred to the Committee on Foreign Relations:

S. RES. 472

Whereas the United States and the Dominican Republic share extensive economic, security, and cultural ties and a mutual commitment to the promotion of internationally recognized human rights, democratic values, and the rule of law;

Whereas the bilateral relationship between the United States and the Dominican Republic has contributed to the economic prosperity and national security of both countries, including through the Dominican Republic-Central America-United States Free Trade Agreement and the Caribbean Basin Security Initiative;

Whereas, under the leadership of President Luis Abinader, who took office on August 16, 2020, the Government of the Dominican Republic has taken steps to effectively address the COVID–19 pandemic, fully vaccinating over 60 percent of its adult population, one of the highest vaccination rates in Latin America and the Caribbean, and acquiring sufficient surplus vaccines to provide donations to other countries in the region;

Whereas, in response to the COVID–19 pandemic, the Government of the Dominican Republic has committed to working with the United States, other Group of 7 countries, the International Monetary Fund, and the Inter-American Development Bank to advance global and regional post-pandemic economic recovery efforts;

Whereas, in 2020, United States foreign direct investment in the Dominican Republic totaled $274,500,000, and remittances from the United States accounted for approximately 78 percent of the over $8,000,000,000 in remittances sent to the Dominican Republic, according to data from the Congressional Research Service and World Bank, respectively;

Whereas, on September 30, 2021, President Abinader signed presidential decree 612–21, creating a ministerial task force to advance nearshoring initiatives and strengthen the Dominican Republic's participation in international supply chains and role as an industrial, manufacturing, and logistical hub, including by expanding the country's network of free trade zones;

Whereas the United States and the Dominican Republic would benefit from a coordinated plan of action to bolster economic relations, realign supply chains, and expand ties between the private sectors in both countries;

Whereas the Government of the United States has engaged with the Dominican Republic and other regional partners to address the United States' serious concerns over the security, human rights, and data privacy risks associated with investments by the People's Republic of China in telecommunication networks and other critical infrastructure;

Whereas the Government of the Dominican Republic has committed to strengthening security cooperation with the United States to address the threats posed by transnational criminal organizations and human trafficking, drug trafficking, and money laundering networks;

Whereas a humanitarian crisis, rampant crime, gang violence, and instability in neighboring Haiti, a situation exacerbated by the July 7, 2021, assassination of President Jovenel Moise, has deepened the suffering of the Haitian people, increased risks to the Dominican Republic posed by organized criminal groups along its borders, and strained the economic capacity of the Government of the Dominican Republic to address the humanitarian needs of Haitian migrants;

Whereas President Abinader has taken significant steps to make the Government of the Dominican Republic more accountable and effective, including by addressing corruption and impunity, appointing an independent Public Prosecutor, requiring additional transparency in public procurement, and proposing legislation to modernize asset forfeiture laws;

Whereas, on October 20, 2021, the Governments of the Dominican Republic, Costa Rica, and Panama signed a joint declaration expressing concern about irregular migration flows, climate change, post-COVID–19 economic recovery, the deteriorating human rights situation in Nicaragua, and the humanitarian crisis in Haiti, and called for stronger cooperation on these issues from the United States, regional partners, and the international community;

Whereas the Government of the Dominican Republic, as host of the Latin America and Caribbean Climate Week 2021, has called for greater regional coordination to address the effects of climate change, including more extreme weather events, biodiversity loss, environmental displacement, and adverse health effects, which Small Island Developing States in the Caribbean are disproportionately vulnerable to;

Whereas the Government of the Dominican Republic has called for the peaceful restoration of democracy and rule of law in Venezuela and is hosting approximately 114,000 Venezuelan refugees; and

Whereas approximately 2,000,000 people of Dominican origin currently reside in the United States, and over 2,000,000 United States tourists visit the Dominican Republic annually, accounting for the largest number of foreign tourists to the country and bolstering its economically critical tourism sector: Now, therefore, be it

Resolved, That the Senate—

(1) reaffirms its commitment to strengthening the historic partnership between the United States and the Dominican Republic based on shared democratic values and efforts to advance economic prosperity and national security;

(2) encourages continued actions by the Government of the Dominican Republic to assume a regional leadership role in promoting human rights, democratic values, and humanitarian assistance;

(3) calls for further steps to strengthen cooperation between the Governments of the United States and the Dominican Republic on issues of shared strategic interest, including—

(A) by assisting the Dominican Republic in its post-COVID–19 economic recovery, including through support for United States and global initiatives that help developing countries recover financial sustainability and attain equitable access to international financial markets;

(B) by developing and implementing nearshoring initiatives in the Caribbean Basin to realign international supply chains and strengthen the Dominican Republic's standing as a significant industrial, manufacturing, and logistical hub, including

through cooperation on infrastructure development such as ports, power grids, and at free trade zones;

(C) facilitating the expansion of economic and commercial ties, including by prioritizing bilateral development project financing and the formation of a United States-Dominican Republic Business Council;

(D) by supporting and developing collaborative efforts to mitigate and adapt to the effects of climate change, including promoting development and strengthening the U.S.-Caribbean Resilience Partnership and similar initiatives;

(E) by improving security cooperation between the two countries, including in addressing narcotics and human trafficking, dismantling money laundering networks, and strengthening professional law enforcement and criminal justice institutions; and

(F) by increasing cooperation with the Dominican Republic and other international partners to promote stability in Haiti, address Haiti's humanitarian crisis, and facilitate political solutions supported by the Haitian people;

(4) urges the Government of the Dominican Republic to continue taking steps to address the inherent human rights, security, and data privacy risks posed by reliance on technology from the People's Republic of China, including Huawei components, in telecommunication networks;

(5) commends efforts by President Abinader to strengthen the political independence of the Attorney General's Office and institutionalize anti-corruption reforms; and

(6) calls on the Department of State and the United States Agency for International Development to continue to support the efforts of the Government of the Dominican Republic to respond to the humanitarian needs of Haitian migrants in the Dominican Republic.

SENATE CONCURRENT RESOLUTION 22—PROVIDING FOR THE USE OF THE CATAFALQUE SITUATED IN THE EXHIBITION HALL OF THE CAPITOL VISITOR CENTER IN CONNECTION WITH MEMORIAL SERVICES TO BE CONDUCTED IN THE ROTUNDA OF THE CAPITOL FOR THE HONORABLE ROBERT JOSEPH DOLE, A SENATOR FROM THE STATE OF KANSAS

Ms. KLOBUCHAR (for herself, Mr. BLUNT, Mr. SCHUMER, and Mr. MCCONNELL) submitted the following concurrent resolution; which was considered and agreed to:

S. CON. RES. 22

Resolved by the Senate (the House of Representatives concurring), That the Architect of the Capitol is authorized and directed to transfer the catafalque which is situated in the Exhibition Hall of the Capitol Visitor Center to the rotunda of the Capitol so that such catafalque may be used in connection with services to be conducted there for the Honorable Robert Joseph Dole, a Senator from the State of Kansas.

SENATE CONCURRENT RESOLUTION 23—AUTHORIZING THE USE OF THE ROTUNDA OF THE CAPITOL FOR THE LYING IN STATE OF THE REMAINS OF THE HONORABLE ROBERT JOSEPH DOLE, A SENATOR FROM THE STATE OF KANSAS

Ms. KLOBUCHAR (for herself, Mr. BLUNT, Mr. SCHUMER, and Mr. MCCONNELL) submitted the following concurrent resolution; which was considered and agreed to:

S. CON. RES. 23

Resolved by the Senate (the House of Representatives concurring), That in recognition of the long and distinguished service rendered to the Nation by Robert Joseph Dole, a Senator from the State of Kansas, his remains be permitted to lie in state in the rotunda of the Capitol on Thursday, December 9, 2021, and the Architect of the Capitol, under the direction of the President pro tempore of the Senate and the Speaker of the House of Representatives, shall take all necessary steps for the accomplishment of that purpose.

AMENDMENTS SUBMITTED AND PROPOSED

SA 4871. Mr. SCHUMER proposed an amendment to the bill S. 610, to address behavioral health and well-being among health care professionals.

SA 4872. Mr. SCHUMER proposed an amendment to amendment SA 4871 proposed by Mr. SCHUMER to the bill S. 610, supra.

SA 4873. Mr. SCHUMER proposed an amendment to the bill S. 610, supra.

SA 4874. Mr. SCHUMER proposed an amendment to amendment SA 4873 proposed by Mr. SCHUMER to the bill S. 610, supra.

SA 4875. Mr. SCHUMER proposed an amendment to amendment SA 4874 proposed by Mr. SCHUMER to the amendment SA 4873 proposed by Mr. SCHUMER to the bill S. 610, supra.

TEXT OF AMENDMENTS

SA 4871. Mr. SCHUMER proposed an amendment to the bill S. 610, to address behavioral health and well-being among health care professionals; as follows:

At the end add the following:

SEC. ___. EFFECTIVE DATE.

This Act shall take effect on the date that is 1 day after the date of enactment of this Act.

SA 4872. Mr. SCHUMER proposed an amendment to amendment SA 4871 proposed by Mr. SCHUMER to the bill S. 610, to address behavioral health and well-being among health care professionals; as follows:

On page 1, line 3, strike ''1 day'' and insert ''2 days''.

SA 4873. Mr. SCHUMER proposed an amendment to the bill S. 610, to address behavioral health and well-being among health care professionals; as follows:

At the end add the following:

SEC. ___. EFFECTIVE DATE.

This Act shall take effect on the date that is 5 days after the date of enactment of this Act.

SA 4874. Mr. SCHUMER proposed an amendment to amendment SA 4873 proposed by Mr. SCHUMER to the bill S. 610, to address behavioral health and well-being among health care professionals; as follows:

On page 1, line 3, strike ''5 days'' and insert ''4 days''.

SA 4875. Mr. SCHUMER proposed an amendment to amendment SA 4874 proposed by Mr. SCHUMER to the amendment SA 4873 proposed by Mr. SCHUMER to the bill S. 610, to address behavioral health and well-being among health care professionals; as follows:

On page 1, line 3, strike ''4 days'' and insert ''3 days''.

AUTHORITY FOR COMMITTEES TO MEET

Mr. WYDEN. Mr. President, I have 7 requests for committees to meet during today's session of the Senate. They have the approval of the Majority and Minority Leaders.

Pursuant to rule XXVI, paragraph 5(a), of the Standing Rules of the Senate, the following committees are authorized to meet during today's session of the Senate:

COMMITTEE ON BANKING, HOUSING, AND URBAN AFFAIRS

The Committee on Banking, Housing, and Urban Affairs is authorized to meet during the session of the Senate on Tuesday, December 7, 2021, at 10 a.m., to conduct a hearing on nominations.

COMMITTEE ON FOREIGN RELATIONS

The Committee on Foreign Relations is authorized to meet during the session of the Senate on Tuesday, December 7, 2021, at 2:30 p.m., to conduct a hearing.

COMMITTEE ON THE JUDICIARY

The Committee on the Judiciary is authorized to meet during the session of the Senate on Tuesday, December 7, 2021, at 10 a.m., to conduct a hearing.

COMMITTEE ON RULES AND ADMINISTRATION

The Committee on Rules and Administration is authorized to meet during the session of the Senate on Tuesday, December 7, 2021, at 10 a.m., to conduct a hearing.

SELECT COMMITTEE ON INTELLIGENCE

The Select Committee on Intelligence is authorized to meet during the session of the Senate on Tuesday, December, 7, 2021, at 2 p.m., to conduct a closed roundtable.

SUBCOMMITTEE ON FISCAL RESPONSIBILITY AND ECONOMIC GROWTH

The Subcommittee on Fiscal Responsibility and Economic Growth of the Committee on Finance is authorized to meet during the session of the Senate on Tuesday, December 7, 2021, at 9:30 a.m., to conduct a hearing.

SUBCOMMITTEE ON SURFACE TRANSPORTATION, MARITIME, FREIGHT, AND PORTS

The Subcommittee on Surface Transportation, Maritime, Freight, and Ports of the Committee on Commerce, Science, and Transportation is authorized to meet during the session of the

Senate on Tuesday, December 7, 2021, at 10 a.m., to conduct a hearing.

PRIVILEGES OF THE FLOOR

Mr. PAUL. Mr. President, I ask unanimous consent that Anthony Charletta, an intern in my office, be granted floor privileges until December 17, 2021.

The PRESIDING OFFICER. Without objection, it is so ordered.

AMENDED NOTICE OF ADOPTION OF REGULATIONS AND TRANSMITTAL FOR CONGRESSIONAL APPROVAL

U.S. CONGRESS,
OFFICE OF CONGRESSIONAL WORKPLACE RIGHTS,
Washington, DC, December 7, 2021.

Hon. PATRICK LEAHY,
President Pro Tempore of the Senate, Washington, DC.

DEAR MR. PRESIDENT: Section 304(b)(3) of the Congressional Accountability Act (CAA), 2 U.S.C. §1384(b)(3), requires that, with regard to substantive regulations under the CAA, after the Board of Directors of the Office of Congressional Workplace Rights (Board) has published a general notice of proposed rulemaking as required by subsection (b)(1), and received comments as required by subsection (b)(2), ''the Board shall adopt regulations and shall transmit notice of such action together with a copy of such regulations to the Speaker of the House of Representatives and the President pro tempore of the Senate for publication in the *Congressional Record* on the first day on which both Houses are in session following such transmittal.''

The Board has adopted the regulations in the Amended Notice of Adoption of Substantive Regulations and Transmittal for Congressional Approval which accompany this transmittal letter. The Board requests that the accompanying Amended Notice be published in the Senate version of the *Congressional Record* on the first day on which both Houses are in session following receipt of this transmittal. The Board has adopted the same regulations for the Senate, the House of Representatives, and the other covered entities and facilities, and therefore recommends that the adopted regulations be approved by concurrent resolution of the Congress.

Any inquiries regarding this notice should be addressed to Susan Tsui Grundmann, Executive Director of the Office of Congressional Workplace Rights, Room LA–200, 110 2nd Street S.E., Washington, DC 20540; 202–724–9250.

Sincerely,

BARBARA CHILDS WALLACE,
Chair of the Board of Directors, Office of Congressional Workplace Rights.

Attachment.

FROM THE BOARD OF DIRECTORS OF THE OFFICE OF CONGRESSIONAL WORKPLACE RIGHTS

AMENDED NOTICE OF ADOPTION OF REGULATIONS AND TRANSMITTAL FOR CONGRESSIONAL APPROVAL

Modifications to the rights and protections under the Family and Medical Leave Act of 1993 (FMLA), Amended Notice of Adoption of Regulations, as required by 2 U.S.C. 1384, Congressional Accountability Act of 1995, as amended (CAA).

Background:

Section 304(b)(3) of the Congressional Accountability Act (CAA), 2 U.S.C. §1384(b)(3), requires that, with regard to substantive regulations under the CAA, after the Board of Directors of the Office of Congressional Workplace Rights (Board) has published a general notice of proposed rulemaking as required by subsection (b)(1), and received comments as required by subsection (b)(2), ''the Board shall adopt regulations and shall transmit notice of such action together with a copy of such regulations to the Speaker of the House of Representatives and the President pro tempore of the Senate for publication in the *Congressional Record* on the first day on which both Houses are in session following such transmittal.''

Section 202 of the CAA (2 U.S.C. 1302 et seq.), applies the rights and protections of sections 101 through 105 of the FMLA to covered employees in the legislative branch. On June 22, 2016, the Board adopted and submitted for publication in the *Congressional Record* amendments to its substantive regulations regarding the FMLA. 162 Cong. Rec. H4128–H4168, S4475–S4516 (daily ed. June 22, 2016). As set forth in the Board's accompanying *Notice of Adoption of Regulations and Transmittal for Congressional Approval*, the 2016 amendments provide needed clarity on certain aspects of the FMLA. Congress has not yet acted on the Board's request for approval of these amendments.

The purpose of this *Amended Notice of Adoption of Regulations and Transmittal for Congressional Approval* is to announce adoption of additional modifications to the existing legislative branch FMLA substantive regulations. Specifically, on December 20, 2019, Congress enacted the Federal Employee Paid Leave Act (subtitle A of title LXXVI of division F of the National Defense Authorization Act for Fiscal Year 2020, Public Law 116–92, December 20, 2019) (FEPLA). FEPLA amended the FMLA to allow most civilian Federal employees, including eligible employees in the legislative branch, to substitute up to 12 weeks of paid parental leave (PPL) for unpaid FMLA leave granted in connection with the birth of an employee's son or daughter or for the placement of a son or daughter with an employee for adoption or foster care. These additional modifications are necessary in order to bring existing legislative branch FMLA regulations (issued April 19, 1996) in line with these recent statutory changes.

What is the authority under the CAA for these substantive regulations?

Section 202(a) of the CAA provides that the rights and protections established by sections 101 through 105 of the FMLA (29 U.S.C. 2611–2615) shall apply to covered employees in the legislative branch. Section 202(d)(1) and (2) of the CAA require that the Board, pursuant to section 304 of the CAA, issue regulations implementing the rights and protections of the FMLA and that those regulations shall be ''the same as substantive regulations promulgated by the Secretary of Labor to implement the statutory provisions referred to in the subsection (a) [of section 202 of the CAA] except insofar as the Board may determine, for good cause shown . . . that a modification of such regulations would be more effective for the implementation of the rights and protections under this section.'' The modifications to the regulations proposed by the Board herein are on all matters for which section 202 of the CAA requires regulations to be issued.

Are there currently FMLA regulations in effect?

Yes. On January 22, 1996, the OCWR Board adopted and submitted for publication in the *Congressional Record* the original FMLA final regulations implementing section 202 of the CAA, which applies certain rights and protections of the FMLA. On April 15, 1996, pursuant to section 304(c) of the CAA, the House and the Senate passed resolutions approving the final regulations. Specifically, the Senate passed S. Res. 242, providing for approval of the final regulations applicable to the Senate and the employees of the Senate; the House passed H. Res. 400 providing for approval of the final regulations applicable to the House and the employees of the House; and the House and the Senate passed S. Con. Res. 51, providing for approval of the final regulations applicable to employing offices and employees other than those offices and employees of the House and the Senate. After the Senate and the House passed these resolutions, the Board formally issued the FMLA regulations on April 19, 1996.

What does the FMLA provide?

In general, the FMLA provides eligible employees the right to take a total of 12 workweeks of unpaid leave during any 12-month period for specified family and medical reasons and for specified circumstances relating to a family member's military service. Employing offices in the legislative branch covered by FMLA provisions of the CAA must provide unpaid leave to eligible employees: (1) for the birth of a son or daughter and to care for the newborn son or daughter; or (2) for placement with the employee of a son or daughter for adoption or foster care; (3) to care for the employee's spouse, son, daughter, or parent with a serious health condition; (4) because of a serious health condition that makes the employee unable to perform the functions of the employee's job; (5) because of any qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is a military member on covered active duty status; and (6) to care for a covered servicemember with a serious injury or illness if the employee is the spouse, son, daughter, parent, or next of kin of the covered servicemember.

How do the FEPLA amendments affect the FMLA as applied to the legislative branch?

The FEPLA amendments to the FMLA include provisions expressly applicable to the legislative branch that both: (1) change the eligibility rules for employees to take protected leave for births or placements under the FMLA; and (2) permit employees to substitute PPL and other paid accrued leave for unpaid FMLA leave for such births or placements. The FEPLA amendments are summarized below.

For purposes of FMLA leave with respect to any birth or placement, all covered employees in the legislative branch are eligible for job-protected leave under the FMLA immediately upon commencement of employment. ''Covered employee'' means any employee of: (1) the House of Representatives; (2) the Senate; (3) the Office of Congressional Accessibility Services; (4) the Capitol Police; (5) the Congressional Budget Office; (6) the Office of the Architect of the Capitol; (7) the Office of the Attending Physician; (8) the Office of Congressional Workplace Rights; (9) the Office of Technology Assessment; (10) the Library of Congress; (11) the John C. Stennis Center for Public Service Training and Development; (12) the China Review Commission; (13) the Congressional Executive China Commission; (14) the Helsinki Commission; or (14) the United States Commission on International Religious Freedom. *See* 2 U.S.C. 1301(a).

Generally, FMLA leave is unpaid leave. However, under certain circumstances, the FEPLA amendments to the FMLA, as made applicable by the CAA, permit an eligible employee to choose to substitute PPL and accrued paid leave (such as paid annual, vacation, personal, family, medical, or sick leave) for unpaid FMLA leave. The term ''substitute'' means that paid leave will run

concurrently with the unpaid FMLA leave. Accordingly, the employee receives pay during the period of otherwise unpaid FMLA leave. For leave taken for a birth or placement, an employee may elect to substitute for unpaid FMLA leave—(1) up to 12 workweeks of PPL in connection with the occurrence of a birth or placement; and (2) any additional paid annual, vacation, personal, family, medical, or sick leave provided by the employing office to such employee. Paid parental leave may be used only ''in connection with the birth or placement involved.'' *See* 2 U.S.C. 1312(d)(2)(A).

By law, unpaid FMLA leave is generally limited to a total of 12 weeks in any 12-month period. Accordingly, any use of unpaid FMLA leave for a purpose other than birth or placement may reduce an employee's ability to substitute PPL for a birth or placement. Thus, for example, if an employee has used 3 weeks of unpaid FMLA leave during the leave year before the birth or placement, that employee's entitlement to 12 weeks of PPL may be reduced to 9 weeks.

Paid parental leave may be used no later than the end of the 12-month period beginning on the date of the birth or placement involved. There are no carryover provisions for unused PPL. An employee may not be paid for unused or expired PPL. Paid parental leave may not be considered annual leave for purposes of making a lump-sum payment for annual leave or for any other purpose.

FEPLA expressly provides that legislative branch employees using parental leave under the FMLA are not subject to the limitations that apply in the executive branch whereby employees may be required to agree in writing to work for the executive branch agency for at least 12 weeks after returning from leave. FEPLA also expressly provides that PPL applies to covered employees in the legislative branch without regard to the limitations that may apply in the executive branch, state and local governments, and private sector, whereby an employer may recover the premiums for maintaining coverage under a group health plan if the employee fails to return from PPL.

When are the Paid Parental Leave provisions of FEPLA effective?

FEPLA provides that the amendments to the CAA concerning PPL are not effective with respect to any birth or placement for adoption or foster care occurring before October 1, 2020. Thus, by law, PPL is available to covered employees only in connection with a birth or placement that occurs on or after October 1, 2020.

How does FEPLA address active duty service in the National Guard or Reserves?

In addition to providing for PPL, effective December 20, 2019, FEPLA also amended the general eligibility provisions of the FMLA (as applied by the CAA) to provide that, for purposes of determining whether a covered employee has been employed by any employing office for at least 12 months and for at least 1,250 hours of service during the 12-month period immediately preceding the commencement of the leave, any service on active duty (as defined in 29 U.S.C. 2611(14)) by a member of the National Guard or Reserves shall be counted as time during which such employee has been employed by an employing office.

Why are these additional changes to the FMLA regulations necessary?

The CAA requires that the FMLA regulations applicable to the legislative branch and promulgated by the OCWR be the same as substantive regulations promulgated by the Secretary of Labor to implement FMLA title I, except insofar as the Board may determine, for good cause shown and stated together with the regulation, that a modification of such regulations would be more effective for the implementation of the rights and protections under the CAA. 2 U.S.C. 1312(e). FMLA title I covers employees of most private sector employers, state and local governments, and certain quasi-governmental entities, such as the U.S. Postal Service. These employees are governed by Department of Labor regulations at 29 C.F.R. 601 and part 825. The Secretary of Labor will not be promulgating FEPLA regulations because FEPLA does not extend PPL to private sector employees or other employees directly covered by FMLA title I. The Board has determined that these circumstances constitute good cause for further modification of its substantive FMLA regulations in order to effectively implement FEPLA's rights and protections to Federal employees in the legislative branch.

Procedural Summary:

How are substantive regulations proposed and approved under the CAA?

Pursuant to section 304 of the CAA, 2 U.S.C. 1384, the procedure for proposing and approving substantive regulations provides that:

(1) the Board of Directors proposes substantive regulations and publishes a general notice of proposed rulemaking in the Congressional Record;

(2) there be a comment period of at least 30 days after the date of publication of the general notice of proposed rulemaking;

(3) after consideration of comments by the Board of Directors, the Board adopts regulations and transmits notice of such action (together with the regulations and a recommendation regarding the method for congressional approval of the regulations) to the Speaker of the House and President Pro Tempore of the Senate for publication in the Congressional Record;

(4) there be committee referral and action on the proposed regulations by resolution in each House, concurrent resolution, or by joint resolution; and

(5) there be final publication of the approved regulations in the Congressional Record, with an effective date prescribed in the final publication. For more detail, please reference the text of 2 U.S.C. 1384.

What is the approach taken by these adopted substantive regulations?

The Board follows the procedures as enumerated above and as required by statute. This Amended Notice of Adopted Rulemaking is step (3) of the outline set forth above. The Board has reviewed and responded to the comments received under step (2) of the outline above, and it has made changes where necessary to ensure that the adopted regulations fully implement section 202 of the CAA, and reflect the practices and policies particular to the legislative branch. (Because the Board's 2016 amendments were adopted pursuant to the procedures for proposing and approving substantive regulations in section 304 of the CAA, 2 U.S.C. 1384, including providing a comment period of 60 days after publication of the proposed amendments in the Congressional Record, the Board did not seek additional comments on those adopted amendments.)

Are there substantive differences in the adopted regulations for the House of Representatives, the Senate and other employing offices?

No. The Board of Directors has identified no ''good cause'' for varying the text of these regulations. Therefore, if these regulations are approved as adopted, there will be one text applicable to all employing offices and covered employees. See 2 U.S.C. 1331(e)(2).

Are these adopted regulations also recommended by the OCWR's Executive Director, the Deputy Executive Director for the Senate, and the Deputy Executive Director for the House of Representatives?

As required by section 304(b)(1) of the CAA, 2 U.S.C. 1384(b)(1), these adopted regulations are also recommended by the Executive Director, the Deputy Executive Director for the Senate and the Deputy Executive Director for the House of Representatives.

Are these adopted substantive regulations available to persons with disabilities in an alternate format?

In addition to being posted on the OCWR's website (www.ocwr.gov), this Notice is also available in alternative formats. Requests for this Notice in an alternative format should be made to the Office of Congressional Workplace Rights, at 202/724–9250 (voice).

Am I allowed to view copies of comments submitted by others?

Yes. Copies of submitted comments will be available for review on the OCWR's public website at www.ocwr.gov.

Summary:

The Congressional Accountability Act of 1995 (CAA), PL 104–1, was enacted into law on January 23, 1995. The CAA, as amended, applies the rights and protections of 13 federal labor and employment statutes to covered employees and employing offices within the legislative branch of the federal government. Section 202 of the CAA applies to employees covered by the CAA, the rights and protections established by sections 101 through 105 of the Family and Medical Leave Act of 1993 (FMLA), 29 U.S.C. 2611–2615. The above provisions of section 202 became effective on January 1, 1997. 2 U.S.C. 1312. The Board of Directors of the Office of Congressional Workplace Rights (OCWR) is now publishing adopted amended regulations to implement section 202 of the CAA, 2 U.S.C. 1301–1438, as applied to covered employees of the House of Representatives, the Senate, and certain congressional instrumentalities listed below.

The purpose of these amended regulations is to implement section 202 of the CAA. In this Amended Notice of Adoption of Regulations, the Board proposes that virtually identical regulations be adopted for the Senate, the House of Representatives, and certain congressional instrumentalities. Accordingly:

(1) *Senate.* The amended regulations adopted in this Notice shall apply to entities within the Senate, as recommended by the OCWR's Deputy Executive Director for the Senate.

(2) *House of Representatives.* The amended regulations adopted in this Notice shall apply to entities within the House of Representatives, as recommended by the OCWR's Deputy Executive Director for the House of Representatives.

(3) *Certain congressional instrumentalities.* The amended regulations adopted in this Notice shall apply to the Office of Congressional Accessibility Services; the Capitol Police; the Congressional Budget Office; the Office of the Architect of the Capitol; the Office of the Attending Physician; the Office of Congressional Workplace Rights; the Office of Technology Assessment; the Library of Congress; the Stennis Center for Public Service; the China Review Commission; the Congressional Executive China Commission; the Helsinki Commission; and the United States Commission on International Religious Freedom; as recommended by the OCWR's Executive Director.

Section-by-Section Discussion of Adopted Changes to the FMLA Regulations

As noted above, Congress has not yet acted on the Board's request for approval of its

amendments to its substantive FMLA regulations that the Board adopted on June 22, 2016. The section-by-section discussion of those amendments appears at 162 Cong. Rec. H4128–H4168, S4475–S4516 (daily ed. June 22, 2016).

The following is a section-by-section discussion of the additional adopted amendments related to FEPLA. The Board's adopted amendments to its substantive FMLA regulations provide more detail regarding the implementation of the statutory provisions summarized above. In order to implement FEPLA, the Board amends subparts A–C of part 825 of its substantive regulations (Family and Medical Leave) to establish how the FMLA provisions will now operate, since the appropriate substitution of paid parental leave for unpaid FMLA leave hinges on the standards for granting unpaid FMLA leave. The Board also amends subpart D to omit obsolete references to the OCWR's administrative dispute resolution procedures, which were significantly amended by the CAA of 1995 Reform Act of 2018, Pub. L. No. 115–397. (Although the Board had also proposed to amend part 825 to add a new subpart E, for the reasons discussed below, the Board has determined not to do so.) Below we provide a section-by-section explanation of the adopted changes in subparts A–D.

Where a change has been made to a regulatory section, that section is discussed below. However, as the DOL has significantly reorganized its FMLA regulations, which the Board's adopted regulations mirror, many of the sections are moved into other areas of the subpart. The Board as a result will use the adopted section and numbers to provide explanation and analysis of changes. In addition, even if a section is not discussed, there may be minor editorial changes or corrections that do not warrant discussion, such as the substitution of the Office's current name, the ''Office of Congressional Workplace Rights'' for its former name, the ''Office of Compliance.''

Note: The use of the terms ''Type A,'' ''Type B,'' ''Type C,'' etc., in this Notice corresponds to the subsections of the FMLA provision describing these types of FMLA leave. Thus, ''Type A'' FMLA leave refers to leave ''[b]ecause of the birth of a son or daughter of the employee and in order to care for such son or daughter.'' *See* 29 U.S.C. 2612(a)(1)(A). ''Type B'' FMLA leave refers to leave ''[b]ecause of the placement of a son or daughter with the employee for adoption or foster care.'' *See* 29 U.S.C. 2612(a)(1)(B). ''Type C'' FMLA leave refers to leave ''[i]n order to care for the spouse, or a son, daughter, or parent, of the employee, if such spouse, son, daughter, or parent has a serious health condition.'' *See* 29 U.S.C. 2612(a)(1)(C). ''Type D'' FMLA leave refers to leave ''[b]ecause of a serious health condition that makes the employee unable to perform the functions of the position of such employee.'' *See* 29 U.S.C. 2612(a)(1)(D). ''Type E'' FMLA leave refers to leave ''[b]ecause of any qualifying exigency (as the Secretary shall, by regulation, determine) arising out of the fact that the spouse, or a son, daughter, or parent of the employee is on covered active duty (or has been notified of an impending call or order to covered active duty) in the Armed Forces.'' *See* 29 U.S.C. 2612(a)(1)(E).

Some commenters suggested that the Board modify the regulations to resolve potential ambiguities in the DOL regulation. However, the Board has long held that it will not opine on interpretive ambiguities in the regulations outside of the adjudicatory context of individual cases. The Board's rulemaking authority under the CAA is restricted to circumstances where there is ''good cause'' to depart from the Secretary of Labor's substantive regulations. Further, the Board's adjudicatory function would be undermined if it prejudged ambiguous or disputed interpretive matters. Therefore, the Board does not find ''good cause'' to modify a regulation where the request is based on an ostensible need for clarification.

Section-by-Section Discussion and Board Consideration of Comments

Part 825—Family and Medical Leave

825.1 Purpose and Scope.

The Board finds good cause to amend 825.1 to add a new paragraph (c), which describes the FEPLA amendments to the FMLA provisions of the CAA; states that the Board is amending its substantive FMLA regulations pursuant to the CAA rulemaking procedures set forth at sections 202(d) and 304 of the CAA; and further states that because the Secretary of Labor has not promulgated FEPLA regulations under FMLA title I, the Board has determined that these circumstances constitute good cause for modification of its substantive FMLA regulations in order to effectively implement FEPLA's rights and protections to Federal employees in the legislative branch. The paragraphs in 825.1 that follow paragraph (c) have been redesignated as paragraphs (d) and (e).

One commenter expressed concerns that the term ''Federal *civilian* employees in the legislative branch'' in proposed paragraph (c) could be read to improperly exclude sworn employees (or police officers) from the scope of the new regulations. The new paragraph (c) omits this term, and instead uses the terms ''Federal employees in the legislative branch'' and ''covered employees.''

Subpart A—COVERAGE UNDER THE FAMILY AND MEDICAL LEAVE ACT

825.100 The Family and Medical Leave Act.

The Board finds good cause to amend paragraph (b) of 825.100 to clarify that the authority of an employing office, disbursing or other financial office to recover the premiums for maintaining coverage under a group health plan is subject to 825.208(k), which provides that paid parental leave applies to covered employees in the legislative branch without regard to such limitations.

One commenter suggested amending paragraph (d) of 825.100 to apprise employees that FMLA leave may be denied, and the employee designated as Absent Without Leave, for failing to comply with the notification requirements outlined in 825.301(b). The Board finds that 825.100(d) is consistent with the DOL's regulation, and that good cause has not been shown to modify the DOL's regulation.

825.102 Definitions.

The Board finds good cause to amend 825.102 to add the following definition of *Birth: ''Birth means the delivery of a child. When the term ''birth'' under this subpart is used in connection with the use of leave before birth, it refers to an anticipated birth.''*

One commenter suggested that the definition of *Birth* in 825.102 should be revised to ensure that employees who intend to deliver a live child and through complications in the birthing process have a birth that results in a deceased child receive the same entitlements during the physical recovery process from the birth as those employees whose birthing process results in the birth of a living child. The Board declines to make the suggested change, as its proposed definition encompasses the circumstances that the commenter describes.

One commenter stated that the proposed definition of *Birth* should be stricken from the regulation in its entirety on the ground that good cause does not exist for modifying the applicable DOL regulation at 29 CFR 825.120(a)(l) or (2) by adding a definition of *Birth* which the commenter believed to be in conflict with the existing FMLA regulations. It states that nothing in the FEPLA nor anything unique to the congressional workplace justifies varying from or adding a definition that conflicts with that regulation.

The Board disagrees. First, as stated above, the Secretary's regulations do not define the term *Birth*. Thus, the Board's definition of *Birth* presents no conflict with the Secretary's regulations. Second, the paid leave benefit under FEPLA for Type A leave provides good cause for adding such a definition. That is, the definition provides the specificity necessary in the Board's regulations to implement the new paid leave provisions of FEPLA in the legislative branch in connection with births and placements. By contrast, the paid leave benefit under FEPLA does not apply to employers and employees covered by the Secretary's FMLA title I regulations. Thus, there is no apparent need for clear distinctions between leave for births, placements, serious health conditions, or other qualifying exigencies in the applicable DOL regulations at 29 CFR 825.120 and 29 CFR 825.121, because the benefit, *i.e.*, 12 weeks of unpaid leave, is the same for any of these reasons.

The commenter also suggests striking the second sentence of the Board's definition of *Birth* on the ground that FEPLA does not permit substitution of paid leave for anticipated births. For the reasons set forth below concerning proposed 825.208, we disagree.

The Board finds good cause to amend the definition of *Covered Employee* in 825.102. The amended definition of *Covered Employee* includes any employee of the Library of Congress; the Stennis Center for Public Service; the China Review Commission; the Congressional Executive China Commission; the Helsinki Commission, and the United States Commission on International Religious Freedom.

The Board finds good cause to amend the definition of *Eligible Employee* in 825.102. The amended definition of *eligible employee* adds a new paragraph (1), which clarifies that for purposes of births or placements, an eligible employee is any covered employee as defined in the CAA, irrespective of whether the employee meets the length of service requirements in paragraph (2). Paragraph (3) of that definition, which concerns eligibility for unpaid FMLA leave for reasons other than births or placements, is amended to clarify that, for purposes of determining whether a covered employee has been employed by any employing office for at least 12 months and for at least 1,250 hours of service during the 12-month period immediately preceding the commencement of the leave, any service on active duty by a member of the National Guard or Reserves shall be counted as time during which such employee has been employed by an employing office.

A commenter recommended that the *Employee of the House of Representatives* definition in 825.102 should be revised to conform with language updates made through amendments and reforms to the CAA. The 2018 CAA Reform Act changed the language in the definition of House employees to reference pay that is disbursed by the Office of the Chief Administrative Officer, rather than the Office of the Clerk. Similarly, although the term ''clerk-hire allowance'' was used in original CAA text in the 1990's, the appropriate reference is now the ''Members' Representational Allowance.'' The Board finds good cause to make the suggested changes.

The Board finds good cause to amend the definition of *Employing Office* in 825.102. The amended definition of *Employing Office* includes any employee of the Library of Congress; the Stennis Center for Public Service;

the China Review Commission; the Congressional Executive China Commission; the Helsinki Commission, and the United States Commission on International Religious Freedom.

The Board finds good cause to amend the definition of *Family and Medical Leave* in 825.102. The revised definition includes new language addressing leave to care for covered servicemembers. One commenter suggested further revising the definition to clarify that it means an employee's entitlement of ''up to'' 12 workweeks (or 26 workweeks in the case of leave under 825.127) of unpaid leave. The Board agrees and has made the suggested change.

A commenter suggested that the definition of *Intermittent Leave* in 825.102 should be revised to include paid leave that is now available under the FMLA FEPLA provisions for reasons of birth or placement of a child for foster care or adoption. The Board finds good cause to make the suggested revision.

The Board had proposed to amend 825.102 to add a new definition of *Placement* that clarified that it refers to a *new* placement. Two commenters stated that the proposed definition was inconsistent with the DOL's regulations at 29 CFR 825.121, which does not limit placements to ''new'' placements. The Board has determined that no good cause has been shown to modify the DOL regulation, and the Board will not include a new definition of *Placement* in its adopted regulations.

One commenter suggested that the definitions of *Son or Daughter*, *Son or Daughter of a Covered Servicemember*, and *Son or Daughter on Covered Active Duty or Call to Covered Active Duty Status* in 825.102 (and 825.126(a)(5)) should be defined to account for circumstances where a child is gender neutral or gender undetermined. The commenter suggests adding a provision to clarify that these definitions include a covered servicemember's biological, adopted, foster child, stepchild, legal ward, and child(ren) for whom the covered servicemember stood in loco parentis, who are of any age, and who identify as transgender, gender neutral, gender non-conforming, or non-binary. The Board has determined that no good cause has been shown to modify the DOL regulation. It notes, however, that both DOL and the Board interpret these terms to include any child.

825.104 Covered employing offices.

The Board finds good cause to amend 825.104 to: (1) designate paragraphs (1)–(4) as paragraphs (a)–(d); and (2) amend paragraph (d) to include the Library of Congress; the Stennis Center for Public Service; the China Review Commission; the Congressional Executive China Commission; the Helsinki Commission; and the United States Commission on International Religious Freedom.

825.110 Eligible employee, general rule.
825.111 Eligible employee, birth or placement.

The Board finds good cause to: (1) amend 825.110 to create a general rule for eligibility for unpaid FMLA leave for reasons other than births or placements; and (2) add a new 825.111 to create a rule for eligibility for unpaid FMLA leave for births or placements. The amendments to 825.110 clarify that its provisions are subject to the exceptions set forth at 825.111; and they provide that for purposes of determining whether a covered employee has been employed by any employing office for at least 12 months and for at least 1,250 hours of service during the 12-month period immediately preceding the commencement of the leave, any service on active duty by a member of the National Guard or Reserves shall be counted as time during which such employee has been employed by an employing office.

The new 825.111 clarifies that, for purposes of births or placements, an eligible employee is any covered employee as defined in the CAA, irrespective of whether the employee meets the length or hours of service requirements in the general rule at 825.110. One commenter suggested deleting the cross-references in 825.111 to subparagraphs (a)(1) or (a)(2) of 825.112. The Board agrees and has revised 825.111 accordingly. The Board has determined not to further revise 825.111 to delete the citation: ''*See also* 825.120–21.''

825.112 Qualifying reasons for leave, general rule.

The Board finds good cause to amend subparagraph (a)(2) of 825.112 to clarify that employing offices are required to grant leave to eligible employees for the placement of a son or daughter with the employee for adoption or foster care, including the care of such son or daughter.

One commenter stated that the citation in subparagraph (a)(1) of 825.112 should be changed to 825.120(a)(1)–(6) in order to exclude citation to the Board's proposed subparagraph (a)(7) of 825.120. As stated below, the Board has determined not to include the proposed subparagraph (a)(7) of 825.120. Therefore, the Board declines to make this revision.

825.120 Leave for pregnancy or birth.

The Board finds good cause to amend subparagraph (a)(1) of 825.120 to clarify that FMLA leave for pregnancy or the birth of a son or daughter includes leave for the care of the newborn child. The Board also finds good cause to amend subparagraph (a)(2) to add a sentence stating that leave for a birth or placement must be concluded by the expiration of the 12-month period beginning on the date of birth.

One commenter noted that subparagraph (a)(3) indicates that spouses who are employed by the same employing office ''*may* be limited to a combined total of 12 weeks of leave,'' which seemingly grants employing offices the discretion to determine whether spouses are entitled to 12 weeks of individual or combined FEPLA leave for births or placements. The commenter states that the final rule should plainly indicate whether this is the intent of the provision or identify the instances when spouses would otherwise be limited to a combined 12 weeks of FEPLA leave. The Board has determined that no good cause has been shown to modify the DOL regulation, which uses the term ''may.'' *See* 29 CFR 825.120(a)(3).

The Board had proposed to add a new subparagraph (a)(7) to 825.120, to state that leave taken because of a birth includes leave necessary for an employee who is the birth mother to recover from giving birth, or for an employee who is the other parent to care for the birth mother during her recovery period, even if the employee is not involved in caring for the son or daughter during portions of that recovery period. Several commenters stated that the new subparagraph (7) should not be included in the final rule, on the ground that no good cause exists for modifying the relevant DOL regulations to add this subparagraph. The Board has determined not to address this issue in the regulations and therefore will not include the proposed subparagraph (a)(7) in 825.120.

825.121 Leave for adoption or foster care.

The Board finds good cause to amend paragraph (a) of 825.121 to clarify that FMLA leave for placement with the employee of a son or daughter for adoption or foster care includes leave to care for the newly placed child.

One commenter stated that the Board should amend subparagraph (a)(3) of 825.121, which concerns spouses who are eligible for FMLA leave and are employed by the same covered employing office, to clarify whether employing offices have discretion to grant the entire 12-week entitlement to both employee spouses; and to identify the circumstances when FEPLA leave must be separated or combined for those eligible employees. The Board's regulation is based on the DOL's regulation, and the Board finds no good cause to further modify that regulation.

One commenter stated that the first sentence of paragraph (b) of 825.121 should be amended to substitute ''the employee's'' for ''the,'' so that the sentence would read: ''An eligible employee may use intermittent or reduced schedule leave after the placement of the employee's healthy child for adoption or foster care only if the employing office agrees.'' The Board has determined that no good cause has been shown to modify the DOL regulation.

SUBPART B—EMPLOYEE LEAVE ENTITLEMENTS UNDER THE FAMILY AND MEDICAL LEAVE ACT, AS MADE APPLICABLE BY THE CONGRESSIONAL ACCOUNTABILITY ACT

825.200 Amount of Leave.

One commenter stated that the Board omitted from the proposed rule the following language from 825.208(f) of its existing FMLA regulation: ''If, before beginning employment with an employing office, an employee had been employed by another employing office, the subsequent employing office may count against the employee's FMLA leave entitlement FMLA leave taken from the prior employing office.'' The commenter states that this language should be included as part of 825.200. For the reasons set forth in the Board's June 22, 2016 Notice of Adopted Rulemaking, this language was relocated to paragraph (e) of 825.110. The Board agrees with the commenter, however, that because this language concerns the amount of FMLA leave available to an employee, it is more appropriately be included in 825.200. Accordingly, the Board has relocated this language to paragraph (j) of 825.200.

825.207 Substitution of paid leave, generally.
825.208 Substitution of paid leave—special rule for paid parental leave.

The Board finds good cause to: (1) amend 825.207 to create a general rule for substitution of paid leave for unpaid FMLA leave for reasons other than births or placements; and (2) add a new 825.208 to create a rule for substitution of paid leave for unpaid FMLA leave for births or placements. The amendments to 825.207 clarify that its provisions are subject to the exceptions set forth at 825.208.

The new paid leave substitution rules, which concern birth events and the placement of a child for adoption or foster care, are now addressed in a new 825.208. Although the proposed 825.208 provided that paid parental leave may be substituted for unpaid FMLA leave based on a birth or placement event as provided in a new proposed subpart E, the Board has determined not to include a subpart E. Rather, as discussed below, relevant provisions of proposed subpart E have been relocated to 825.208, and the paragraphs of 825.208 have been redesignated accordingly.

Paragraph (a) of 825.208 (previously proposed as subparagraph 825.500(b)(3) of subpart E), clarifies that the PPL provisions of the FMLA apply to births or placements occurring on or after October 1, 2020.

Paragraph (b) of 825.208 (previously proposed as paragraph (a) of 825.208) addresses the purpose of the new 825.208. Paragraph (c) of 825.208 (previously proposed as paragraph (b) of 825.208) addresses the possibility of substituting PPL or paid annual, vacation, personal, family, medical, or sick leave for unpaid FMLA leave in connection with a birth or placement.

One commenter suggests that 825.208(b)(1) should be revised to add ''or'' to account for alternative circumstances, such as when the birth of a child does not result in the care of a newborn child. The Board has determined that the suggested change is unnecessary.

One commenter states that because paragraphs (b) and (c) of 825.208 cross-reference the entire section 825.120 (''Leave for pregnancy or birth''), those paragraphs impermissibly expand the entitlement to PPL and the right to demand to substitute paid leave for unpaid leave beyond what Congress provided in the FEPLA. Specifically, the commenter contends that only birth-related events described in subparagraphs (a)(1) and (2) of section 825.120 (covering birth and bonding time) constitute Type A FMLA leave, but that other birth-related events described in 825.120, such as prenatal care and incapacity due to pregnancy, can only constitute Type C or D leave. By referencing 825.120 in its entirety, the commenter concludes, the substitution provisions of 825.208(b) and (c) would impermissibly expand FEPLA to allow substitution for birth-related Type C or D leave. The commenter recommends that paragraphs (b) and (c) should cross-reference 29 U.S.C. 2612(1)(A) or (B) rather than cross-referencing 825.120.

The Board disagrees. First, it is well-established that circumstances may qualify for FMLA leave under more than one FMLA leave type, such as when an employee or the employee's child has a serious health condition requiring continuing medical treatment after the birth of the child. Therefore, the fact that leave for prenatal care and incapacity due to pregnancy could constitute Type C or D leave does not bar an employee from substituting paid leave under FEPLA on the ground that it is also in connection with Type A leave. 2 USC 1312(d)(2).

Second, acceptance of the commenter's position would lead to the incongruous result that paid leave in connection with the placement of a child for adoption or foster care may be substituted for unpaid FMLA leave taken prior to the actual placement, but paid leave in connection with the birth of a child may not be substituted for unpaid FMLA leave taken prior to the actual birth. As stated above, the CAA, as amended by the FEPLA, provides that ''[a] covered employee may elect to substitute for any leave without pay under subparagraph (A) or (B) of section 102(a)(1) of the [FMLA] any paid leave which is available to such employee for that purpose.'' Subparagraph (A) concerns leave without pay ''[b]ecause of the birth of a son or daughter of the employee and in order to care for such son or daughter;'' and subparagraph (B) concerns leave without pay ''[b]ecause of the placement of a son or daughter with the employee for adoption or foster care.'' 2 USC 1312(d). Regarding placements, the Secretary's regulations at 29 CFR 825.121, which the Board has adopted, expressly provide that ''[e]mployees may take FMLA leave *before* the actual placement or adoption of a child if an absence from work is required for the placement for adoption or foster care to proceed,'' such as ''to attend counseling sessions, appear in court, consult with his or her attorney or the doctor(s) representing the birth parent, submit to a physical examination, or travel to another country to complete an adoption.'' 29 CFR 825.121(a)(1) (emphasis added). Such leave before the placement could *only* constitute leave ''[b]ecause of the placement'' covered by subparagraph (B) of FMLA section 102(a)(1), *i.e.*, it could not constitute unpaid leave because of a birth, serious health condition, or other qualifying exigency under FMLA sections (A), (C), (D) or (E).

Under FEPLA, ''[a] covered employee may elect to substitute for any leave without pay under subparagraph . . . (B) . . . any paid leave which is available to such employee for that purpose.'' The paid leave that is available to a covered employee for that purpose is up to 12 weeks ''of paid parental leave *in connection with* the . . . placement involved,'' and ''[a]ny additional paid annual, vacation, personal, family, medical, or sick leave provided by the employing office to such employee.'' 2 USC 1312(d)(2) (emphasis added). Accordingly, under FEPLA, covered employees may elect to substitute paid leave for any FMLA leave without pay taken before the actual placement of a child for adoption or foster care if an absence from work is required for the placement to proceed.

Similarly, regarding births, the Secretary's regulations at 29 CFR 825.120 provide that unpaid FMLA leave because of the birth of a child may be used prior to the actual birth. Congress could not have intended that an employee may substitute paid leave under FEPLA for a physical examination in connection with an anticipated placement but not in connection with an anticipated birth. Under FEPLA, ''[a] covered employee may elect to substitute for any leave without pay under subparagraph . . . (A) . . . any paid leave which is available to such employee for that purpose.'' As with placements, the paid leave that is available to a covered employee for that purpose is up to 12 weeks ''of paid parental leave *in connection with* the . . . birth involved,'' and ''[a]ny additional paid annual, vacation, personal, family, medical, or sick leave provided by the employing office to such employee.'' 2 USC 1312(d)(2) (emphasis added). Accordingly, the Board's regulations provide that under FEPLA, covered employees may elect to substitute paid leave for any FMLA leave without pay taken before, and in connection with, the birth of a child.

The Board stresses that the Board's regulations do not impermissibly expand or increase the 12 weeks of PPL granted to covered employees under FEPLA; rather, they merely define the circumstances upon which those 12 weeks of PPL benefits may be used. Therefore, if a covered employee substitutes PPL leave in connection with, but prior to the actual birth or placement, less (or no) PPL leave may be available for the employee to substitute after the birth or placement occurs.

One commenter noted that subparagraph (c)(2) refers to ''annual, vacation, personal, family, medical, or sick leave,'' but in subparagraph (e)(4) there is a reference to ''annual leave or sick leave.'' The commenter recommends making this language consistent throughout the regulations. The Board agrees, and has determined that it would be most consistent with the purposes and provisions of FEPLA to use the term ''annual, vacation, personal, family, medical, or sick leave.''

Paragraph (d) of 825.208 (previously proposed as subparagraph 825.502(b)(2) of subpart E), concerns covered employees' FEPLA leave entitlement. Several commenters suggested that paragraph (d) be revised to further clarify the availability of PPL in cases where there are multiple uses of FMLA leave during a 12-month period. Given the fact-specific nature of such situations, the Board has revised paragraph (d) to set forth the following general principle, to be applied to resolve particular cases as they arise: ''Since an employee may use only 12 weeks of unpaid FMLA leave in any 12-month period under 825.200(a), any use of unpaid FMLA leave not associated with paid parental leave may affect an employee's ability to use the full 12 weeks of paid parental leave within a single 12-month period. The specific amount of paid parental leave available will depend on when the employee uses various types of unpaid FMLA leave relative to any 12-month period established under 825.200(b).''

Paragraph (e) of 825.208 (previously proposed as paragraph (c) of 825.208) sets forth various general rules related to an employee's entitlement to substitute paid leave. An employee is entitled to elect whether or not to substitute paid leave for unpaid FMLA leave, subject to applicable law and regulation. Thus, an employing office may not deny an employee's election to make a substitution permitted under this section. Nor may an employing office require an employee to substitute paid leave for FMLA leave without pay. Subparagraph (e)(4) adds a statement, not previously included in the FMLA regulations, indicating that an employee may request to use annual leave or sick leave without invoking family and medical leave, and, in that case, the agency exercises its normal authority with respect to approving or disapproving the timing of when the leave may be used. In general, an employing office has the right to deny the scheduling of an employee's leave requested outside of an FMLA request, but if the employee's scheduling of FMLA leave is approved, the employee's request to substitute annual leave for FMLA leave without pay may not be denied.

One commenter expressed concern that subparagraph (e)(4) of section 825.208 could be misinterpreted to have a meaning that conflicts with sections 825.300 and 825.301 and is inconsistent with a DOL interpretation letter from 2019, which states, ''Once an eligible employee communicates a need to take leave for an FMLA-qualifying reason, neither the employee nor the employer may decline FMLA protection for that leave.'' The commenter notes that sections 825.300 and 825.301 require employing offices to identify and designate as FMLA leave any employee request for leave that qualifies for FMLA protection, even if the employee does not explicitly ''invoke'' the FMLA. For example, if an employee were to request to use sick leave immediately following childbirth, ''without invoking family and medical leave,'' subparagraph (e)(4) would permit the employing office to grant or deny the sick leave request and not designate the leave as Type A or D FMLA leave as required by sections 825.300 and 825.301—even though the employing office has sufficient information to know that the employee is requesting leave that qualifies for both Types of FMLA leave. Accordingly, the commenter states that subparagraph (e)(4) of section 825.208 must be revised to remove the conflict with sections 825.300 and 825.301. The Board agrees and has modified subparagraph (e)(4) accordingly.

Paragraph (f) of 825.208 (previously proposed as paragraph (d) of 825.208) addresses an employee's obligation to generally give advance notice of the employee's election to substitute paid leave for unpaid FMLA leave. The general rule is that retroactive substitution is not allowed. However, subparagraphs (f)(2) through (f)(3) set forth limited exceptions. Paragraph (f)(4) addresses the retroactive substitution of paid parental leave and links to 825.505, which allows retroactive substitution only if an employee is physically or mentally incapacitated.

Several commenters expressed concern that the retroactive designations described in subparagraphs (f)(2)–(4) could conflict with the statute governing the compensation and adjustment of compensation of certain congressional employees. We understand the concern but disagree with one commenter's conclusion that these subparagraphs must therefore be stricken. Rather, we have revised the general rule at subparagraph (f)(1) to provide that retroactive substitution under subparagraphs (f)(2)–(4) is permissible, provided such retroactive substitution does not violate any applicable law or regulation.

Paragraph (g) of 825.208 (previously proposed as paragraph 825.503 of subpart E) concerns pay during leave. It provides that the pay an employee receives when using paid parental leave shall be the same pay the employee would receive if the employee were using annual leave.

One commenter recommended that paragraph (g) should not include the second subparagraph of the proposed rule, which concerned premium pay provisions that are inapplicable to congressional employees. The Board agrees and has made the suggested deletion.

Paragraph (h) of 825.208 (previously proposed as subparagraph 825.502(d) of subpart E) concerns treatment of unused leave. It provides that, if an employee has any unused balance of paid parental leave remaining at the end of the 12-month period following the birth or placement involved, the entitlement to the unused leave expires at that time. The unused leave may not be rolled over for use in a future period, nor may a payment be made to the employee for unused paid parental leave that has expired. Paid parental leave may not be considered annual leave for purposes of making a lump-sum payment for annual leave or for any other purpose.

One commenter suggested that paragraph (h) should be revised to clarify that the forfeiture of unused paid parental leave does not impact an employee's ability to use unpaid FMLA leave for other qualifying reasons, to the extent that the employee is eligible for such leave in accordance with 825.110, 825.112, and 825.200. The Board agrees and has made the recommended clarification.

Paragraph (i) of 825.208 (previously proposed as subparagraph 825.500(c) of subpart E) clarifies that an employing office is responsible for the proper administration of 825.208, including the responsibility of informing employees of their entitlements and obligations. The proposed rule provided that ''[t]he head of'' an employing office was responsible. The Board agrees with two commenters who suggested omitting this phrase on the ground that leave and compensation responsibilities are typically delegated by the head of an employing office to a designee. The final rule has been so revised.

Paragraph (j) of 825.208 (previously proposed as subparagraph 825.500(b)(2) of subpart E) provides that the OCWR will defer to supplemental regulations on PPL issued by the Library of Congress pursuant to the authority in 29 USC 2617, provided those supplemental regulations are consistent with the regulations herein.

Paragraph (k) of 825.208 (previously proposed as subparagraph 825.504(a) of subpart E) addresses the applicability of certain FEPLA provisions concerning the obligation to return to work. Subparagraph (k)(1) of 825.208 clarifies that under FEPLA, legislative branch employees using PPL are not subject to the limitations that apply in the executive branch whereby employees may be required to agree in writing to work for the executive branch agency for at least 12 weeks after returning from leave. Subparagraph (k)(2) (previously proposed as subparagraph 825.504(b) of subpart E) clarifies that under FEPLA, PPL applies to covered employees in the legislative branch without regard to the limitations that may apply in the executive branch, state and local governments, and private sector, whereby an employer may recover the premiums for maintaining coverage under a group health plan if the employee fails to return from PPL.

One commenter suggested omitting subparagraph (k)(1) on the ground that the statutory limitations referred to in this subparagraph only apply to executive branch employees and are not included in the FEPLA provisions that apply to congressional employees. The Board declines to adopt commenter's suggestion, as the final regulation concerns the FEPLA amendment to the CAA at 2 USC 1312(d)(4)(C).

Paragraph (l) of 825.208 (previously proposed as paragraph 825.505 of subpart E) provides that the application of paid parental leave in cases where an employee is incapacitated at the time the use of paid parental leave would be permissible. Subparagraph (1) allows the employee to retroactively use paid parental leave. This provision allows for the retroactive election to use paid parental leave under the FMLA if the employing office determines that an otherwise eligible employee who could have made an election during a past period to substitute paid parental leave was physically or mentally incapable of doing so during that past period. Upon this determination, the employing office must allow the employee, when no longer incapacitated, to make an election to substitute paid parental leave for applicable unpaid FMLA leave. The employee must make this election within 5 workdays of returning to work.

We disagree with one commenter's suggestion that this provision should be deleted. However, as with paragraph (f), the Board has revised subparagraph (l)(1) to provide that retroactive substitution under subparagraphs (f)(2)–(4) is permissible provided such retroactive substitution does not violate any applicable law or regulation.

Subparagraph (2) of 825.208(l) allows an employee's personal representative to elect, on behalf of the employee, to substitute paid parental leave for applicable unpaid FMLA leave (i.e., approved FMLA leave based on birth or placement of a child). If an employing office determines that an otherwise eligible employee is physically or mentally incapable of making an election to substitute paid parental leave, the employing office must, upon the request of the employee's personal representative, provide conditional approval of substitution of paid parental leave for applicable unpaid FMLA leave on a prospective basis.

One commenter suggests that subparagraph (l)(2) should be revised to substitute ''learns''' for ''determines.'' The Board agrees and has made the suggested modification. Further, the commenter suggests that subparagraph (l)(2) should be revised to include an option for the employee to rebut the presumption that paid parental leave was desired during the period of incapacitation. For example, the employee might elect to use another form of leave in order to preserve the period of paid parental leave for a later time during the 12-month period. The Board agrees and has revised subparagraph (l)(2) accordingly. The additional language that allows an employee to rebut the presumption of a PPL request upon his/her return to duty mirrors language in subparagraph (l)(1).

Paragraph (m) of 825.208 (previously proposed as paragraph 825.506 of subpart E) addresses the application of paid parental leave in cases in which an employee has multiple children newly born or placed in the same time period. Subparagraph (1) provides that if an employee has multiple children born or placed on the same day, that event will be treated as a single event triggering a single entitlement of up to 12 weeks of paid parental leave during the 12-month period following the event. Subparagraph (2) of 825.208(m) provides that, if an employee has one or more births or placements during the 12-month period following the date of an earlier birth or placement, the provisions of 825.208 shall be independently administered for each birth or placement event.

The Board has opted not to include examples in 825.208; rather, as stated above, the Board will not opine on interpretive ambiguities in the regulations outside of the adjudicatory context of individual cases. Further, the Board's adjudicatory function would be undermined if it prejudged ambiguous or disputed interpretive matters in its substantive regulations.

825.213 Employing office recovery of benefit costs.

The Board finds good cause to amend paragraph (a) of 825.213 to clarify that the authority of an employing office, disbursing or other financial office to recover the premiums for maintaining coverage under a group health plan is subject to 825.504, which provides that paid parental leave applies to covered employees in the legislative branch without regard to such limitations.

SUBPART C—EMPLOYEE AND EMPLOYING OFFICE RIGHTS AND OBLIGATIONS UNDER THE FMLA, AS MADE APPLICABLE BY THE CAA

825.300 Employing office notice requirements.

The Board finds good cause to amend subparagraph (c)(iii) of 825.300 to add a requirement that the employing office's rights and responsibilities notice to the employee include, where applicable, notice of the employee's right to substitute paid parental leave for unpaid FMLA leave for a birth or placement.

The Board also finds good cause to amend subparagraph (d)(6) of 825.300 to clarify that the employing office must notify the employee of the amount of leave counted against the employee's FMLA leave entitlement, and, if applicable, the employee's paid parental leave entitlement.

One commenter stated that paragraph (e) of section 825.300 has no basis in applicable law and should be stricken. As the Board stated in 2016 in response to a similar comment: The CAA incorporates the ''rights and protections established by section 101 through 105'' of the FMLA and incorporates remedies ''as would be appropriate if awarded under'' section 107(a)(1) of the FMLA. See 2 U.S.C. 1312(a)(1), (b). The Board agrees that Section 109 of the FMLA is not incorporated in the CAA, and that no legal authority exists for a regulation that incorporates requirements and penalties based on section 109 of the FMLA. However, the Board does not agree with the commenter's assertion that the remedies for section 825.300(e) derive from Section 109 of the FMLA, and finds that no good cause has been shown to modify the DOL regulation.

825.301 Designation of FMLA leave.

One commenter suggested that 825.301, which concerns designation of FMLA leave, should explain that once an employing office properly designates the absence as FMLA leave, the employee cannot overturn the designation. The Board does not find good cause to amend 825.301.

SUBPART D—ADMINISTRATIVE PROCESS

825.400 Administrative process, general rules.

The Board has amended 825.400 to omit obsolete references to the OCWR's administrative dispute resolution procedures, which were significantly amended by the CAA of 1995 Reform Act of 2018, Pub. L. No. 115–397. The revised 825.400 refers to the Board's revised Procedural Rules, which apply to matters filed with the OCWR on or after June 19, 2019.

SUBPART E—PAID PARENTAL LEAVE

The Board had proposed to amend part 825 of its substantive FMLA regulations to add a new subpart E. In its final adopted rule, the Board has determined not to add a new subpart E. Rather, the provisions of proposed subpart E concerning substitution of paid leave under FEPLA have been consolidated with 825.208, discussed above.

The Board finds good cause to amend paragraph (f) of 825.702 to delete the parenthetical phrase ''(and, therefore, not an ''eligible'' employee under FMLA, as made applicable by the CAA).'' It remains the case that under Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act, and as made applicable by the CAA, an employing office should provide the same benefits for women who are pregnant as the employing office provides to other employees with short-term disabilities, as stated in paragraph (f). However, as a result of FEPLA, an employee employed for less than 12 months is now an ''eligible'' employee for purposes of unpaid FMLA leave for births and placements. *See* 825.111.

REGULATIONS OF THE BOARD OF DIRECTORS OF THE OFFICE OF CONGRESSIONAL WORKPLACE RIGHTS EXTENDING RIGHTS AND PROTECTIONS UNDER THE FAMILY AND MEDICAL ACT OF 1996, AS AMENDED

Part 825—Family and Medical Leave

825.1 Purpose and scope.

(a) Section 202 of the Congressional Accountability Act (CAA) (2 U.S.C. 1312) applies the rights and protections of sections 101 through 105 of the Family and Medical Leave Act of 1993 (FMLA) (29 U.S.C. 2611–2615) to covered employees. (The term ''covered employee'' is defined in section 101(3) of the CAA (2 U.S.C. 1301(3)). *See* 825.102 of these regulations for that definition.) The purpose of this part is to set forth the regulations to carry out the provisions of section 202 of the CAA.

(b) These regulations are issued by the Board of Directors (Board) of the Office of Congressional Workplace Rights, pursuant to sections 202(d) and 304 of the CAA, which direct the Board to promulgate regulations implementing section 202 that are ''the same as substantive regulations promulgated by the Secretary of Labor to implement the statutory provisions referred to in subsection (a) [of section 202 of the CAA] except insofar as the Board may determine, for good cause shown . . . that a modification of such regulations would be more effective for the implementation of the rights and protections under this section.'' The regulations issued by the Board herein are on all matters for which section 202 of the CAA requires regulations to be issued. Specifically, it is the Board's considered judgment, based on the information available to it at the time of the promulgation of these regulations, that, with the exception of regulations adopted and set forth herein, there are no other ''substantive regulations promulgated by the Secretary of Labor to implement the statutory provisions referred to in subsection (a) [of section 202 of the CAA].''

(c) On December 20, 2019, Congress enacted the Federal Employee Paid Leave Act (subtitle A of title LXXVI of division F of the National Defense Authorization Act for Fiscal Year 02020, Public Law 116–92, December 20, 2019) (FEPLA). FEPLA amended the FMLA to allow most Federal employees, including eligible employees in the legislative branch, to substitute up to 12 weeks of paid parental leave (PPL) for unpaid FMLA leave granted in connection with the birth of an employee's son or daughter or for the placement of a son or daughter with an employee for adoption or foster care.

In order to implement FEPLA in the legislative branch, the Board is amending its substantive FMLA regulations pursuant to the CAA rulemaking procedures set forth at sections 202(d) and 304 of the CAA. The Secretary of Labor has not promulgated FEPLA

regulations, however, because FEPLA does not extend PPL to private sector employees or other employees directly covered by FMLA title I. The Board has determined that these circumstances constitute good cause for modification of its substantive FMLA regulations in order to effectively implement FEPLA's rights and protections to covered employees in the legislative branch.

(d) In promulgating these regulations, the Board has made certain technical and nomenclature changes to the regulations as promulgated by the Secretary. Such changes are intended to make the provisions adopted accord more naturally to situations in the legislative branch. However, by making these changes, the Board does not intend a substantive difference between these regulations and those of the Secretary from which they are derived. Moreover, such changes, in and of themselves, are not intended to constitute an interpretation of the regulation or of the statutory provisions of the CAA upon which they are based.

(e) Pursuant to section 304(b)(4) of the CAA, 2 U.S.C. 1384(b)(4), the Board of Directors is required to recommend to Congress a method of approval for these regulations. As the Board has adopted the same regulations for the Senate, the House of Representatives, and the other covered entities and facilities, it therefore recommends that the adopted regulations be approved by concurrent resolution of the Congress.

SUBPART A—COVERAGE UNDER THE FAMILY AND MEDICAL LEAVE ACT, AS MADE APPLICABLE BY THE CONGRESSIONAL ACCOUNTABILITY ACT

825.100 The Family and Medical Leave Act.

(a) The Family and Medical Leave Act of 1993 (FMLA), as made applicable by the Congressional Accountability Act (CAA), allows eligible employees of an employing office to take job-protected, unpaid leave, or to substitute appropriate paid leave if the employee has earned or accrued it, for up to a total of 12 workweeks in any 12 months (*See* 825.200(b)) because of the birth of a child and to care for the newborn child, because of the placement of a child with the employee for adoption or foster care, because the employee is needed to care for a family member (child, spouse, or parent) with a serious health condition, because the employee's own serious health condition makes the employee unable to perform the functions of his or her job, or because of any qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is a military member on active duty or call to covered active duty status (or has been notified of an impending call or order to covered active duty). In addition, eligible employees of a covered employing office may take job-protected, unpaid leave, or substitute appropriate paid leave if the employee has earned or accrued it, for up to a total of 26 workweeks in a single 12-month period to care for a covered servicemember with a serious injury or illness. In certain cases, FMLA leave may be taken on an intermittent basis rather than all at once, or the employee may work a part-time schedule.

(b) An employee on FMLA leave is also entitled to have health benefits maintained while on leave as if the employee had continued to work instead of taking the leave. If an employee was paying all or part of the premium payments prior to leave, the employee would continue to pay his or her share during the leave period. Subject to 825.208(k), the employing office or a disbursing or other financial office may recover its share only if the employee does not return to work for a reason other than the serious health condition of the employee or the employee's covered family member, the serious injury or illness of a covered servicemember, or another reason beyond the employee's control.

(c) An employee generally has a right to return to the same position or an equivalent position with equivalent pay, benefits, and working conditions at the conclusion of the leave. The taking of FMLA leave cannot result in the loss of any benefit that accrued prior to the start of the leave.

(d) The employing office generally has a right to advance notice from the employee. In addition, the employing office may require an employee to submit certification to substantiate that the leave is due to the serious health condition of the employee or the employee's covered family member, due to the serious injury or illness of a covered servicemember, or because of a qualifying exigency. Failure to comply with these requirements may result in a delay in the start of FMLA leave. Pursuant to a uniformly applied policy, the employing office may also require that an employee present a certification of fitness to return to work when the absence was caused by the employee's serious health condition (*See* 825.312 and 825.313)). The employing office may delay restoring the employee to employment without such certificate relating to the health condition which caused the employee's absence.

825.101 Purpose of the FMLA.

(a) FMLA is intended to allow employees to balance their work and family life by taking reasonable unpaid leave for medical reasons, for the birth or adoption of a child, for the care of a child, spouse, or parent who has a serious health condition, for the care of a covered servicemember with a serious injury or illness, or because of a qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is a military member on covered active duty or call to covered active duty status. The FMLA is intended to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity. It was intended that the FMLA accomplish these purposes in a manner that accommodates the legitimate interests of employing offices, and in a manner consistent with the Equal Protection Clause of the Fourteenth Amendment in minimizing the potential for employment discrimination on the basis of sex, while promoting equal employment opportunity for men and women.

(b) The FMLA was predicated on two fundamental concerns—the needs of the American workforce, and the development of high-performance organizations. Increasingly, America's children and elderly are dependent upon family members who must spend long hours at work. When a family emergency arises, requiring workers to attend to seriously-ill children or parents, or to newly-born or adopted infants, or even to their own serious illness, workers need reassurance that they will not be asked to choose between continuing their employment, and meeting their personal and family obligations or tending to vital needs at home.

(c) The FMLA is both intended and expected to benefit employing offices as well as their employees. A direct correlation exists between stability in the family and productivity in the workplace. FMLA will encourage the development of high-performance organizations. When workers can count on durable links to their workplace they are able to make their own full commitments to their jobs. The record of hearings on family and medical leave indicate the powerful productive advantages of stable workplace relationships, and the comparatively small costs of guaranteeing that those relationships will not be dissolved while workers attend to pressing family health obligations or their own serious illness.

825.102 Definitions.

For purposes of this part:

ADA means the Americans with Disabilities Act (42 U.S.C. 12101 et seq., as amended), as made applicable by the Congressional Accountability Act.

Birth means the delivery of a child. When the term ''birth'' under this subpart is used in connection with the use of leave before birth, it refers to an anticipated birth.

CAA means the Congressional Accountability Act of 1995 (Pub. Law 104–1, 109 Stat. 3, 2 U.S.C. 1301 et seq., as amended).

COBRA means the continuation coverage requirements of Title X of the Consolidated Omnibus Budget Reconciliation Act of 1986 (Pub. Law 99–272, title X, section 10002; 100 Stat. 227; 29 U.S.C. 1161–1168).

Contingency operation means a military operation that:

(1) Is designated by the Secretary of Defense as an operation in which members of the Armed Forces are or may become involved in military actions, operations, or hostilities against an enemy of the United States or against an opposing military force; or

(2) Results in the call or order to, or retention on, active duty of members of the uniformed services under section 688, 12301(a), 12302, 12304, 12305, or 12406 of Title 10 of the United States Code, chapter 15 of Title 10 of the United States Code, or any other provision of law during a war or during a national emergency declared by the President or Congress. *See also* 825.126(a)(2).

Continuing treatment by a health care provider means any one of the following:

(1) *Incapacity and treatment.* A period of incapacity of more than three consecutive, full calendar days, and any subsequent treatment or period of incapacity relating to the same condition, that also involves:

(i) Treatment two or more times, within 30 days of the first day of incapacity, unless extenuating circumstances exist, by a health care provider, by a nurse under direct supervision of a health care provider, or by a provider of health care services (e.g., physical therapist) under orders of, or on referral by, a health care provider; or

(ii) Treatment by a health care provider on at least one occasion, which results in a regimen of continuing treatment under the supervision of the health care provider.

(iii) The requirement in paragraphs (i) and (ii) of this definition for treatment by a health care provider means an in-person visit to a health care provider. The first in-person treatment visit must take place within seven days of the first day of incapacity.

(iv) Whether additional treatment visits or a regimen of continuing treatment is necessary within the 30-day period shall be determined by the health care provider.

(v) The term ''extenuating circumstances'' in paragraph (i) means circumstances beyond the employee's control that prevent the follow-up visit from occurring as planned by the health care provider. Whether a given set of circumstances are extenuating depends on the facts. *See also* 825.115(a)(5).

(2) *Pregnancy or prenatal care.* Any period of incapacity due to pregnancy, or for prenatal care. *See also* 825.120.

(3) *Chronic conditions.* Any period of incapacity or treatment for such incapacity due to a chronic serious health condition. A chronic serious health condition is one which:

(i) Requires periodic visits (defined as at least twice a year) for treatment by a health care provider, or by a nurse under direct supervision of a health care provider;

(ii) Continues over an extended period of time (including recurring episodes of a single underlying condition); and

(iii) May cause episodic rather than a continuing period of incapacity (e.g., asthma, diabetes, epilepsy, etc.).

(4) *Permanent or long-term conditions.* A period of incapacity which is permanent or long-term due to a condition for which treatment may not be effective. The employee or family member must be under the continuing supervision of, but need not be receiving active treatment by, a health care provider. Examples include Alzheimer's, a severe stroke, or the terminal stages of a disease.

(5) *Conditions requiring multiple treatments.* Any period of absence to receive multiple treatments (including any period of recovery therefrom) by a health care provider or by a provider of health care services under orders of, or on referral by, a health care provider, for:

(i) Restorative surgery after an accident or other injury; or

(ii) A condition that would likely result in a period of incapacity of more than three consecutive full calendar days in the absence of medical intervention or treatment, such as cancer (chemotherapy, radiation, etc.), severe arthritis (physical therapy), kidney disease (dialysis).

(6) Absences attributable to incapacity under paragraphs (2) or (3) of this definition qualify for FMLA leave even though the employee or the covered family member does not receive treatment from a health care provider during the absence, and even if the absence does not last more than three consecutive, full calendar days. For example, an employee with asthma may be unable to report for work due to the onset of an asthma attack or because the employee's health care provider has advised the employee to stay home when the pollen count exceeds a certain level. An employee who is pregnant may be unable to report to work because of severe morning sickness.

Covered active duty or call to covered active duty status means:

(1) In the case of a member of the Regular Armed Forces, duty during the deployment of the member with the Armed Forces to a foreign country; and,

(2) In the case of a member of the Reserve components of the Armed Forces, duty during the deployment of the member with the Armed Forces to a foreign country under a Federal call or order to active duty in support of a contingency operation pursuant to: Section 688 of Title 10 of the United States Code, which authorizes ordering to active duty retired members of the Regular Armed Forces and members of the retired Reserve who retired after completing at least 20 years of active service; Section 12301(a) of Title 10 of the United States Code, which authorizes ordering all reserve component members to active duty in the case of war or national emergency; Section 12302 of Title 10 of the United States Code, which authorizes ordering any unit or unassigned member of the Ready Reserve to active duty; Section 12304 of Title 10 of the United States Code, which authorizes ordering any unit or unassigned member of the Selected Reserve and certain members of the Individual Ready Reserve to active duty; Section 12305 of Title 10 of the United States Code, which authorizes the suspension of promotion, retirement or separation rules for certain Reserve components; Section 12406 of Title 10 of the United States Code, which authorizes calling the National Guard into Federal service in certain circumstances; chapter 15 of Title 10 of the United States Code, which authorizes calling the National Guard and state military into Federal service in the case of insurrections and national emergencies; or any other provision of law during a war or during a national emergency declared by the President or Congress so long as it is in support of a contingency operation. *See* 10 U.S.C. 101(a)(13)(B). *See also* 825.126(a).

Covered employee as defined in the CAA, means any employee of—(1) the House of Representatives; (2) the Senate; (3) the Office of Congressional Accessibility Services; (4) the Capitol Police; (5) the Congressional Budget Office; (6) the Office of the Architect of the Capitol; (7) the Office of the Attending Physician; (8) the Office of Congressional Workplace Rights; (9) the Library of Congress; (10) the Stennis Center for Public Service; (11) the Office of Technology Assessment; (12) the China Review Commission; (13) the Congressional Executive China Commission; (14) the Helsinki Commission; or (15) the United States Commission on International Religious Freedom.

Covered servicemember means:

(1) A current member of the Armed Forces, including a member of the National Guard or Reserves, who is undergoing medical treatment, recuperation, or therapy, is otherwise in outpatient status, or is otherwise on the temporary disability retired list, for a serious injury or illness, or

(2) A covered veteran who is undergoing medical treatment, recuperation, or therapy for a serious injury or illness.

Covered veteran means an individual who was a member of the Armed Forces (including a member of the National Guard or Reserves), and was discharged or released under conditions other than dishonorable at any time during the five-year period prior to the first date the eligible employee takes FMLA leave to care for the covered veteran. *See* 825.127(b)(2).

Eligible employee as defined in the CAA, means:

(1) For purposes of leave under subparagraphs (a)(1) or (a)(2) of section 825.112 [or subsections (A) or (B) of section 102(a)(1) of the FMLA], a covered employee as defined in the CAA.

(2) For purposes of leave under subparagraphs (a)(3)–(6) of section 825.112 [or subsections (C)–(F) of section 102(a)(1) of the FMLA], a covered employee who has been employed for a total of at least 12 months in any employing office on the date on which any FMLA leave is to commence, except that an employing office need not consider any period of previous employment that occurred more than seven years before the date of the most recent hiring of the employee, unless:

(i) The break in service is occasioned by the fulfillment of the employee's Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. 4301, et seq., covered service obligation (the period of absence from work due to or necessitated by USERRA-covered service must be also counted in determining whether the employee has been employed for at least 12 months by any employing office, but this section does not provide any greater entitlement to the employee than would be available under the USERRA, as made applicable by the CAA); or

(ii) A written agreement, including a collective bargaining agreement, exists concerning the employing office's intention to rehire the employee after the break in service (e.g., for purposes of the employee furthering his or her education or for childrearing purposes); and

(3) Who, on the date on which any FMLA leave is to commence, has met the hours of service requirement by having been employed for at least 1,250 hours of service with an employing office during the previous 12-month period, except that:

(i) An employee returning from fulfilling his or her USERRA-covered service obligation shall be credited with the hours of service that would have been performed but for the period of absence from work due to or necessitated by USERRA-covered service in determining whether the employee met the hours of service requirement (accordingly, a person reemployed following absence from work due to or necessitated by USERRA-covered service has the hours that would have been worked for the employing office added to any hours actually worked during the previous 12-month period to meet the hours of service requirement);

(ii) To determine the hours that would have been worked during the period of absence from work due to or necessitated by USERRA-covered service, the employee's pre-service work schedule can generally be used for calculations; and

(iii) Any service on active duty (as defined in 29 U.S.C. 2611(14)) by a covered employee who is a member of the National Guard or Reserves shall be counted as time during which such employee has been employed in an employing office for purposes of paragraph (3) of this section.

Employ means to suffer or permit to work.

Employee means an employee as defined by the CAA and includes an applicant for employment and a former employee.

Employee employed in an instructional capacity. See the definition of *Teacher* in this section.

Employee of the Capitol Police means any member or officer of the Capitol Police.

Employee of the House of Representatives means an individual occupying a position the pay for which is disbursed by the Chief Administrative Officer of the House of Representatives, or another official designated by the House of Representatives, or any employment position in an entity that is paid with funds derived from the Members' Representational Allowance of the House of Representatives but not any such individual employed by any entity listed in subparagraphs (3) through (9) under the definition of covered employee above.

Employee of the Office of the Architect of the Capitol means any employee of the Office of the Architect of the Capitol or the Botanic Garden.

Employee of the Senate means any employee whose pay is disbursed by the Secretary of the Senate, but not any such individual employed by any entity listed in subparagraphs (3) through (9) under the definition of covered employee above.

Employing Office, as defined by the CAA, means:

(1) The personal office of a Member of the House of Representatives or of a Senator;

(2) A committee of the House of Representatives or the Senate or a joint committee;

(3) Any other office headed by a person with the final authority to appoint, hire, discharge, and set the terms, conditions, or privileges of the employment of an employee of the House of Representatives or the Senate; or

(4) The Office of Congressional Accessibility Services, the United States Capitol Police, the Congressional Budget Office, the Office of the Architect of the Capitol, the Office of the Attending Physician, the Office of Congressional Workplace Rights, the Library of Congress, the Stennis Center for Public Service, the Office of Technology Assessment, the United States Commission on International Religious Freedom, the China Review Commission, the Congressional Executive China Commission, and the Helsinki Commission.

Employment benefits means all benefits provided or made available to employees by an employing office, including group life insurance, health insurance, disability insurance, sick leave, annual leave, educational benefits, and pensions, regardless of whether such benefits are provided by a practice or written

policy of an employing office or through an employee benefit plan. The term does not include non-employment related obligations paid by employees through voluntary deductions such as supplemental insurance coverage. See also 825.209(a).

Family and medical leave means an employee's entitlement of up to 12 workweeks (or 26 workweeks in the case of leave under 825.127) of unpaid leave for certain family and medical needs, as prescribed under the FMLA, as made applicable by the CAA.

FLSA means the Fair Labor Standards Act (29 U.S.C. 201 et seq.), as made applicable by the CAA.

FMLA means the Family and Medical Leave Act of 1993, Public Law 103–3 (February 5, 1993), 107 Stat. 6 (29 U.S.C. 2601 et seq., as amended), as made applicable by the CAA.

Group health plan means the Federal Employees Health Benefits Program and any other plan of, or contributed to by, an employing office (including a self-insured plan) to provide health care (directly or otherwise) to the employing office's employees, former employees, or the families of such employees or former employees. For purposes of FMLA, as made applicable by the CAA, the term group health plan shall not include an insurance program providing health coverage under which employees purchase individual policies from insurers provided that:

(1) No contributions are made by the employing office;

(2) Participation in the program is completely voluntary for employees;

(3) The sole functions of the employing office with respect to the program are, without endorsing the program, to permit the insurer to publicize the program to employees, to collect premiums through payroll deductions and to remit them to the insurer;

(4) The employing office receives no consideration in the form of cash or otherwise in connection with the program, other than reasonable compensation, excluding any profit, for administrative services actually rendered in connection with payroll deduction; and,

(5) The premium charged with respect to such coverage does not increase in the event the employment relationship terminates.

Health care provider means:

(1) The FMLA, as made applicable by the CAA, defines health care provider as:

(i) A doctor of medicine or osteopathy who is authorized to practice medicine or surgery (as appropriate) by the State in which the doctor practices; or

(ii) Any other person determined by the Department of Labor to be capable of providing health care services.

(2) Others ''capable of providing health care services'' include only:

(i) Podiatrists, dentists, clinical psychologists, optometrists, and chiropractors (limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by X-ray to exist) authorized to practice in the State and performing within the scope of their practice as defined under State law;

(ii) Nurse practitioners, nurse-midwives and clinical social workers and physician assistants who are authorized to practice under State law and who are performing within the scope of their practice as defined under State law;

(iii) Christian Science practitioners listed with the First Church of Christ, Scientist in Boston, Massachusetts. Where an employee or family member is receiving treatment from a Christian Science practitioner, an employee may not object to any requirement from an employing office that the employee or family member submit to examination (though not treatment) to obtain a second or third certification from a health care provider other than a Christian Science practitioner except as otherwise provided under applicable State or local law or collective bargaining agreement;

(iv) Any health care provider from whom an employing office or a group health plan's benefits manager will accept certification of the existence of a serious health condition to substantiate a claim for benefits; and

(v) A health care provider listed above who practices in a country other than the United States, who is authorized to practice in accordance with the law of that country, and who is performing within the scope of his or her practice as defined under such law.

(3) The phrase ''authorized to practice in the State'' as used in this section means that the provider must be authorized to diagnose and treat physical or mental health conditions.

Incapable of self-care means that the individual requires active assistance or supervision to provide daily self-care in several of the ''activities of daily living'' (ADLs) or ''instrumental activities of daily living'' (IADLs). Activities of daily living include adaptive activities such as caring appropriately for one's grooming and hygiene, bathing, dressing and eating. Instrumental activities of daily living include cooking, cleaning, shopping, taking public transportation, paying bills, maintaining a residence, using telephones and directories, using a post office, etc.

Instructional employee: See the definition of *Teacher* in this section.

Intermittent leave means leave taken in separate periods of time due to a single illness or injury, birth, or placement, rather than for one continuous period of time, and may include leave of periods from an hour or more to several weeks. Examples of intermittent leave would include leave taken on an occasional basis for medical appointments, or leave taken several days at a time spread over a period of six months, such as for chemotherapy.

Invitational travel authorization (ITA) or Invitational travel order (ITO) mean orders issued by the Armed Forces to a family member to join an injured or ill servicemember at his or her bedside. *See also* 825.310(e).

Key employee means a salaried FMLA-eligible employee who is among the highest paid 10 percent of all the employees employed by the employing office within 75 miles of the employee's worksite. *See also* 825.217.

Mental disability: See the definition of *Physical or mental disability* in this section.

Military caregiver leave means leave taken to care for a covered servicemember with a serious injury or illness under the Family and Medical Leave Act of 1993. *See also* 825.127.

Next of kin of a covered servicemember means the nearest blood relative other than the covered servicemember's spouse, parent, son, or daughter, in the following order of priority: blood relatives who have been granted legal custody of the covered servicemember by court decree or statutory provisions, brothers and sisters, grandparents, aunts and uncles, and first cousins, unless the covered servicemember has specifically designated in writing another blood relative as his or her nearest blood relative for purposes of military caregiver leave under the FMLA. When no such designation is made, and there are multiple family members with the same level of relationship to the covered servicemember, all such family members shall be considered the covered servicemember's next of kin and may take FMLA leave to provide care to the covered servicemember, either consecutively or simultaneously. When such designation has been made, the designated individual shall be deemed to be the covered servicemember's only next of kin. *See also* 825.127(d)(3).

Office of Congressional Workplace Rights means the independent office established in the legislative branch under section 301 of the CAA (2 U.S.C. 1381).

Outpatient status means, with respect to a covered servicemember who is a current member of the Armed Forces, the status of a member of the Armed Forces assigned to either a military medical treatment facility as an outpatient; or a unit established for the purpose of providing command and control of members of the Armed Forces receiving medical care as outpatients. *See also* 825.127(b)(1).

Parent means a biological, adoptive, step or foster father or mother or any other individual who stood in loco parentis to the employee when the employee was a son or daughter as defined below. This term does not include parents ''in law.''

Parent of a covered servicemember means a covered servicemember's biological, adoptive, step or foster father or mother, or any other individual who stood in loco parentis to the covered servicemember. This term does not include parents ''in law.'' *See also* 825.127(d)(2).

Physical or mental disability means a physical or mental impairment that substantially limits one or more of the major life activities of an individual. Regulations at 29 CFR part 1630, issued by the Equal Employment Opportunity Commission under the Americans with Disabilities Act (ADA), 42 U.S.C. 12101 et seq., as amended, provide guidance for these terms.

Reduced leave schedule means a leave schedule that reduces the usual number of hours per workweek, or hours per workday, of an employee.

Reserve components of the Armed Forces, for purposes of qualifying exigency leave, include the Army National Guard of the United States, Army Reserve, Navy Reserve, Marine Corps Reserve, Air National Guard of the United States, Air Force Reserve, and Coast Guard Reserve, and retired members of the Regular Armed Forces or Reserves who are called up in support of a contingency operation. *See also* 825.126(a)(2)(i).

Secretary means the Secretary of Labor or authorized representative.

Serious health condition means an illness, injury, impairment, or physical or mental condition that involves inpatient care as defined in 825.114 or continuing treatment by a health care provider as defined in 825.115. Conditions for which cosmetic treatments are administered (such as most treatments for acne or plastic surgery) are not serious health conditions unless inpatient hospital care is required or unless complications develop. Restorative dental or plastic surgery after an injury or removal of cancerous growths are serious health conditions provided all the other conditions of this regulation are met. Mental illness or allergies may be serious health conditions, but only if all the conditions of 825.113 are met.

Serious injury or illness means:

(1) In the case of a current member of the Armed Forces, including a member of the National Guard or Reserves, an injury or illness that was incurred by the covered servicemember in the line of duty on active duty in the Armed Forces or that existed before the beginning of the member's active duty and was aggravated by service in the line of duty on active duty in the Armed Forces and that may render the servicemember medically unfit to perform the duties of the member's office, grade, rank, or rating; and

(2) In the case of a covered veteran, an injury or illness that was incurred by the member in the line of duty on active duty in the Armed Forces (or existed before the beginning of the member's active duty and was

aggravated by service in the line of duty on active duty in the Armed Forces) and manifested itself before or after the member became a veteran, and is:

(i) A continuation of a serious injury or illness that was incurred or aggravated when the covered veteran was a member of the Armed Forces and rendered the servicemember unable to perform the duties of the servicemember's office, grade, rank, or rating; or

(ii) A physical or mental condition for which the covered veteran has received a U.S. Department of Veterans Affairs Service-Related Disability Rating (VASRD) of 50 percent or greater, and such VASRD rating is based, in whole or in part, on the condition precipitating the need for military caregiver leave; or

(iii) A physical or mental condition that substantially impairs the covered veteran's ability to secure or follow a substantially gainful occupation by reason of a disability or disabilities related to military service, or would do so absent treatment; or

(iv) An injury, including a psychological injury, on the basis of which the covered veteran has been enrolled in the Department of Veterans Affairs Program of Comprehensive Assistance for Family Caregivers. *See also* 825.127(c).

Son or daughter means a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis, who is either under age 18, or age 18 or older and ''incapable of self-care because of a mental or physical disability'' at the time that FMLA leave is to commence.

Son or daughter of a covered servicemember means a covered servicemember's biological, adopted, or foster child, stepchild, legal ward, or a child for whom the covered servicemember stood in loco parentis, and who is of any age. *See also* 825.127(d)(1).

Son or daughter on covered active duty or call to covered active duty status means the employee's biological, adopted, or foster child, stepchild, legal ward, or a child for whom the employee stood in loco parentis, who is on covered active duty or call to covered active duty status, and who is of any age. *See also* 825.126(a)(5).

Spouse means a husband or wife. For purposes of this definition, husband or wife refers to the other person with whom an individual entered into marriage as defined or recognized under state law for purposes of marriage in the State in which the marriage was entered into or, in the case of a marriage entered into outside of any State, if the marriage is valid in the place where entered into and could have been entered into in at least one State. This definition includes an individual in a same-sex or common law marriage that either:

(1) Was entered into in a State that recognizes such marriages; or

(2) If entered into outside of any State, is valid in the place where entered into and could have been entered into in at least one State.

Teacher (or employee employed in an instructional capacity, or instructional employee) means an employee employed principally in an instructional capacity by an educational agency or school whose principal function is to teach and instruct students in a class, a small group, or an individual setting, and includes athletic coaches, driving instructors, and special education assistants such as signers for the hearing impaired. The term does not include teacher assistants or aides who do not have as their principal function actual teaching or instructing, nor auxiliary personnel such as counselors, psychologists, curriculum specialists, cafeteria workers, maintenance workers, bus drivers, or other primarily noninstructional employees.

TRICARE is the health care program serving active duty servicemembers, National Guard and Reserve members, retirees, their families, survivors, and certain former spouses worldwide.

825.103 [Reserved]

825.104 Covered employing offices.

The FMLA, as made applicable by the CAA, covers all employing offices. As used in the CAA, the term employing office means:

(a) The personal office of a Member of the House of Representatives or of a Senator;

(b) A committee of the House of Representatives or the Senate or a joint committee;

(c) Any other office headed by a person with the final authority to appoint, hire, discharge, and set the terms, conditions, or privileges of the employment of an employee of the House of Representatives or the Senate; or

(d) The Office of Congressional Accessibility Services, the United States Capitol Police, the Congressional Budget Office, the Office of the Architect of the Capitol, the Office of the Attending Physician, the Office of Congressional Workplace Rights, the Library of Congress, the Stennis Center for Public Service, the China Review Commission, the Congressional Executive China Commission, the Helsinki Commission, the United States Commission on International Religious Freedom, and the Office of Technology Assessment.

825.105 [Reserved].

825.106 Joint employer coverage.

(a) Where two or more employing offices exercise some control over the work or working conditions of the employee, the employing offices may be joint employers under FMLA, as made applicable by the CAA. Where the employee performs work which simultaneously benefits two or more employing offices, or works for two or more employing offices at different times during the workweek, a joint employment relationship generally will be considered to exist in situations such as:

(1) Where there is an arrangement between employing offices to share an employee's services or to interchange employees;

(2) Where one employing office acts directly or indirectly in the interest of the other employing office in relation to the employee; or

(3) Where the employing offices are not completely disassociated with respect to the employee's employment and may be deemed to share control of the employee, directly or indirectly, because one employing office controls, is controlled by, or is under common control with the other employing office.

(b) A determination of whether or not a joint employment relationship exists is not determined by the application of any single criterion, but rather the entire relationship is to be viewed in its totality. For example, joint employment will ordinarily be found to exist when:

(1) An employee, who is employed by an employing office other than the personal office of a Member of the House of Representatives or of a Senator, is under the actual direction and control of the Member of the House of Representatives or Senator; or

(2) Two or more employing offices employ an individual to work on common issues or other matters for both or all of them.

(c) When employing offices employ a covered employee jointly, they may designate one of themselves to be the primary employing office, and the other or others to be the secondary employing office(s). Such a designation shall be made by written notice to the covered employee.

(d) If an employing office is designated a primary employing office pursuant to paragraph (c) of this section, only that employing office is responsible for giving required notices to the covered employee, providing FMLA leave, and maintenance of health benefits. Job restoration is the primary responsibility of the primary employing office, and the secondary employing office(s) may, subject to the limitations in 825.216, be responsible for accepting the employee returning from FMLA leave.

(e) If employing offices employ an employee jointly, but fail to designate a primary employing office pursuant to paragraph (c) of this section, then all of these employing offices shall be jointly and severally liable for giving required notices to the employee, for providing FMLA leave, for assuring that health benefits are maintained, and for job restoration. The employee may give notice of need for FMLA leave, as described in 825.302 and 825.303, to whichever of these employing offices the employee chooses. If the employee makes a written request for restoration to one of these employing offices, that employing office shall be primarily responsible for job restoration, and the other employing office(s) may, subject to the limitations in 825.216, be responsible for accepting the employee returning from FMLA leave.

825.107 [Reserved]

825.108 [Reserved]

825.109 [Reserved]

825.110 Eligible employee, general rule.

(a) Subject to the exceptions provided in 825.111, an eligible employee is a covered employee of an employing office who:

(1) Has been employed by any employing office for at least 12 months, and

(2) Has been employed for at least 1,250 hours of service during the 12-month period immediately preceding the commencement of the leave.

(b) Any service on active duty (as defined in 29 U.S.C. 2611(14)) by a covered employee who is a member of the National Guard or Reserves shall be counted as time during which such employee has been employed in an employing office for purposes of paragraph (a)(1) and (2) of this section.

(c) The 12 months an employee must have been employed by any employing office need not be consecutive months, provided:

(1) Subject to the exceptions provided in paragraph (c)(2) of this section, employment periods prior to a break in service of seven years or more need not be counted in determining whether the employee has been employed by any employing office for at least 12 months.

(2) Employment periods preceding a break in service of more than seven years must be counted in determining whether the employee has been employed by any employing office for at least 12 months where:

(i) The employee's break in service is occasioned by the fulfillment of his or her Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. 4301, et seq., covered service obligation. The period of absence from work due to or necessitated by USERRA-covered service must be also counted in determining whether the employee has been employed for at least 12 months by any employing office. However, this section does not provide any greater entitlement to the employee than would be available under the USERRA; or

(ii) A written agreement, including a collective bargaining agreement, exists concerning the employing office's intention to rehire the employee after the break in service (e.g., for purposes of the employee furthering his or her education or for childrearing purposes).

(3) If an employee worked for two or more employing offices sequentially, the time worked will be aggregated to determine whether it equals 12 months.

(4) If an employee is maintained on the payroll for any part of a week, including any periods of paid or unpaid leave (sick, vacation) during which other benefits or compensation are provided by the employing office (e.g., Federal Employees' Compensation, group health plan benefits, etc.), the week counts as a week of employment. For purposes of determining whether intermittent/occasional/casual employment qualifies as at least 12 months, 52 weeks is deemed to be equal to 12 months.

(5) Nothing in this section prevents employing offices from considering employment prior to a continuous break in service of more than seven years when determining whether an employee has met the 12-month employment requirement. However, if an employing office chooses to recognize such prior employment, the employing office must do so uniformly, with respect to all employees with similar breaks in service.

(d)(1) If an employee was employed by two or more employing offices, either sequentially or concurrently, the hours of service will be aggregated to determine whether the minimum of 1,250 hours has been reached.

(2) Except as provided in paragraph (c)(3) of this section, whether an employee has worked the minimum 1,250 hours of service is determined according to the principles established under the Fair Labor Standards Act (FLSA), as applied by section 203 of the CAA (2 U.S.C. 1313), for determining compensable hours of work. The determining factor is the number of hours an employee has worked for one or more employing offices as defined by the CAA. The determination is not limited by methods of recordkeeping, or by compensation agreements that do not accurately reflect all of the hours an employee has worked for or been in service to the employing office. Any accurate accounting of actual hours worked under the FLSA's principles, as made applicable by the CAA (2 U.S.C. 1313), may be used.

(3) An employee returning from USERRA-covered service shall be credited with the hours of service that would have been performed but for the period of absence from work due to or necessitated by USERRA-covered service in determining the employee's eligibility for FMLA-qualifying leave. Accordingly, a person reemployed following USERRA-covered service has the hours that would have been worked for the employing office added to any hours actually worked during the previous 12-month period to meet the hours of service requirement. In order to determine the hours that would have been worked during the period of absence from work due to or necessitated by USERRA-covered service, the employee's pre-service work schedule can generally be used for calculations.

(4) In the event an employing office does not maintain an accurate record of hours worked by an employee, including for employees who are exempt from the overtime requirements of the FLSA, as made applicable by the CAA and its regulations, the employing office has the burden of showing that the employee has not worked the requisite hours. An employing office must be able to clearly demonstrate, for example, that full time teachers (*See* 825.102 for definition) of an elementary or secondary school system, or institution of higher education, or other educational establishment or institution (who often work outside the classroom or at their homes) did not work 1,250 hours during the previous 12 months in order to claim that the teachers are not covered or eligible for FMLA leave.

(e) The determination of whether an employee meets the hours of service requirement for any employing office and has been employed by any employing office for a total of at least 12 months, must be made as of the date the FMLA leave is to start. An employee may be on non-FMLA leave at the time he or she meets the 12-month eligibility requirement, and in that event, any portion of the leave taken for an FMLA-qualifying reason after the employee meets the eligibility requirement would be FMLA leave. *See* 825.300(b) for rules governing the content of the eligibility notice given to employees.

825.111 Eligible employee, birth or placement.

For purposes of leave under subsections (A) or (B) of section 102(a)(1) of the FMLA, 29 USC 2612(a)(1)(A) or (B):

(a) an eligible employee is a covered employee of an employing office; and

(b) the eligibility requirements of section 825.110 shall not apply. *See also* 825.120–21.

825.112 Qualifying reasons for leave, general rule.

(a) Circumstances qualifying for leave. Employing offices covered by FMLA as made applicable by the CAA are required to grant leave to eligible employees:

(1) For birth of a son or daughter, and to care for the newborn child (*See* 825.120);

(2) For the placement of a son or daughter with the employee for adoption or foster care and the care of such son or daughter (*See* 825.121);

(3) To care for the employee's spouse, son, daughter, or parent with a serious health condition (*See* 825.113 and 825.122);

(4) Because of a serious health condition that makes the employee unable to perform the functions of the employee's job (*See* 825.113 and 825.123);

(5) Because of any qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is a military member on covered active duty (or has been notified of an impending call or order to covered active duty status) (*See* 825.122 and 825.126); and

(6) To care for a covered servicemember with a serious injury or illness if the employee is the spouse, son, daughter, parent, or next of kin of the covered servicemember (*See* 825.122 and 825.127).

(b) *Equal Application*. The right to take leave under FMLA, as made applicable by the CAA, applies equally to male and female employees. A father, as well as a mother, can take family leave for the birth, placement for adoption, or foster care of a child.

(c) *Active employee*. In situations where the employing office/employee relationship has been interrupted, such as an employee who has been on layoff, the employee must be recalled or otherwise be re-employed before being eligible for FMLA leave. Under such circumstances, an eligible employee is immediately entitled to further FMLA leave for a qualifying reason.

825.113 Serious health condition.

(a) For purposes of FMLA, *serious health condition entitling an employee to FMLA leave* means an illness, injury, impairment, or physical or mental condition that involves inpatient care as defined in 825.114 or continuing treatment by a health care provider as defined in 825.115.

(b) The term incapacity means inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefore, or recovery therefrom.

(c) The term treatment includes (but is not limited to) examinations to determine if a serious health condition exists and evaluations of the condition. Treatment does not include routine physical examinations, eye examinations, or dental examinations. A regimen of continuing treatment includes, for example, a course of prescription medication (e.g., an antibiotic) or therapy requiring special equipment to resolve or alleviate the health condition (e.g., oxygen). A regimen of continuing treatment that includes the taking of over-the-counter medications such as aspirin, antihistamines, or salves; or bedrest, drinking fluids, exercise, and other similar activities that can be initiated without a visit to a health care provider, is not, by itself, sufficient to constitute a regimen of continuing treatment for purposes of FMLA leave.

(d) Conditions for which cosmetic treatments are administered (such as most treatments for acne or plastic surgery) are not serious health conditions unless inpatient hospital care is required or unless complications develop. Ordinarily, unless complications arise, the common cold, the flu, ear aches, upset stomach, minor ulcers, headaches other than migraine, routine dental or orthodontia problems, periodontal disease, etc., are examples of conditions that do not meet the definition of a serious health condition and do not qualify for FMLA leave. Restorative dental or plastic surgery after an injury or removal of cancerous growths are serious health conditions provided all the other conditions of this regulation are met. Mental illness or allergies may be serious health conditions, but only if all the conditions of this section are met.

825.114 Inpatient care.

Inpatient care means an overnight stay in a hospital, hospice, or residential medical care facility, including any period of incapacity as defined in 825.113(b), or any subsequent treatment in connection with such inpatient care.

825.115 Continuing treatment.

A serious health condition involving continuing treatment by a health care provider includes any one or more of the following:

(a) *Incapacity and treatment*. A period of incapacity of more than three consecutive, full calendar days, and any subsequent treatment or period of incapacity relating to the same condition, that also involves:

(1) Treatment two or more times, within 30 days of the first day of incapacity, unless extenuating circumstances exist, by a health care provider, by a nurse under direct supervision of a health care provider, or by a provider of health care services (e.g., physical therapist) under orders of, or on referral by, a health care provider; or

(2) Treatment by a health care provider on at least one occasion, which results in a regimen of continuing treatment under the supervision of the health care provider.

(3) The requirement in paragraphs (a)(1) and (2) of this section for treatment by a health care provider means an in-person visit to a health care provider. The first (or only) in-person treatment visit must take place within seven days of the first day of incapacity.

(4) Whether additional treatment visits or a regimen of continuing treatment is necessary within the 30-day period shall be determined by the health care provider.

(5) The term *extenuating circumstances* in paragraph (a)(1) of this section means circumstances beyond the employee's control that prevent the follow-up visit from occurring as planned by the health care provider. Whether a given set of circumstances are extenuating depends on the facts. For example, extenuating circumstances exist if a health care provider determines that a second in-person visit is needed within the 30-day period, but the health care provider does not have any available appointments during that time period.

(b) *Pregnancy or prenatal care*. Any period of incapacity due to pregnancy, or for prenatal care. *See also* 825.120.

(c) *Chronic conditions.* Any period of incapacity or treatment for such incapacity due to a chronic serious health condition. A chronic serious health condition is one which:

(1) Requires periodic visits (defined as at least twice a year) for treatment by a health care provider, or by a nurse under direct supervision of a health care provider;

(2) Continues over an extended period of time (including recurring episodes of a single underlying condition); and

(3) May cause episodic rather than a continuing period of incapacity (e.g., asthma, diabetes, epilepsy, etc.).

(d) *Permanent or long-term conditions.* A period of incapacity which is permanent or long-term due to a condition for which treatment may not be effective. The employee or family member must be under the continuing supervision of, but need not be receiving active treatment by, a health care provider. Examples include Alzheimer's, a severe stroke, or the terminal stages of a disease.

(e) *Conditions requiring multiple treatments.* Any period of absence to receive multiple treatments (including any period of recovery therefrom) by a health care provider or by a provider of health care services under orders of, or on referral by, a health care provider, for:

(1) Restorative surgery after an accident or other injury; or

(2) A condition that would likely result in a period of incapacity of more than three consecutive, full calendar days in the absence of medical intervention or treatment, such as cancer (chemotherapy, radiation, etc.), severe arthritis (physical therapy), or kidney disease (dialysis).

(f) Absences attributable to incapacity under paragraphs (b) or (c) of this section qualify for FMLA leave even though the employee or the covered family member does not receive treatment from a health care provider during the absence, and even if the absence does not last more than three consecutive, full calendar days. For example, an employee with asthma may be unable to report for work due to the onset of an asthma attack or because the employee's health care provider has advised the employee to stay home when the pollen count exceeds a certain level. An employee who is pregnant may be unable to report to work because of severe morning sickness.

825.116 [Reserved]

825.117 [Reserved]

825.118 [Reserved]

825.119 Leave for treatment of substance abuse.

(a) Substance abuse may be a serious health condition if the conditions of 825.113 through 825.115 are met. However, FMLA leave may only be taken for treatment for substance abuse by a health care provider or by a provider of health care services on referral by a health care provider. On the other hand, absence because of the employee's use of the substance, rather than for treatment, does not qualify for FMLA leave.

(b) Treatment for substance abuse does not prevent an employing office from taking employment action against an employee. The employing office may not take action against the employee because the employee has exercised his or her right to take FMLA leave for treatment. However, if the employing office has an established policy, applied in a non-discriminatory manner that has been communicated to all employees, that provides under certain circumstances an employee may be terminated for substance abuse, pursuant to that policy the employee may be terminated whether or not the employee is presently taking FMLA leave. An employee may also take FMLA leave to care for a covered family member who is receiving treatment for substance abuse. The employing office may not take action against an employee who is providing care for a covered family member receiving treatment for substance abuse.

825.120 Leave for pregnancy or birth.

(a) *General rules.* Eligible employees are entitled to FMLA leave for pregnancy or birth of a son or daughter and to care for the newborn child as follows:

(1) Both parents are entitled to FMLA leave for the birth of their child.

(2) Both parents are entitled to FMLA leave to be with the healthy newborn child (i.e., bonding time) during the 12-month period beginning on the date of birth. An employee's entitlement to FMLA leave for a birth expires at the end of the 12-month period beginning on the date of the birth. If the employing office permits bonding leave to be taken beyond this period, such leave will not qualify as FMLA leave. Under this section, both parents are entitled to FMLA leave even if the newborn does not have a serious health condition.

(3) Spouses who are eligible for FMLA leave and are employed by the same employing office may be limited to a combined total of 12 weeks of leave during any 12-month period if the leave is taken for birth of the employee's son or daughter or to care for the child after birth, for placement of a son or daughter with the employee for adoption or foster care or to care for the child after placement, or to care for the employee's parent with a serious health condition. This limitation on the total weeks of leave applies to leave taken for the reasons specified as long as the spouses are employed by the same employing office. It would apply, for example, even though the spouses are employed at two different worksites of an employing office. On the other hand, if one spouse is ineligible for FMLA leave, the other spouse would be entitled to a full 12 weeks of FMLA leave. Where spouses both use a portion of the total 12-week FMLA leave entitlement for either the birth of a child, for placement for adoption or foster care, or to care for a parent, the spouses would each be entitled to the difference between the amount he or she has taken individually and 12 weeks for FMLA leave for other purposes. For example, if each spouse took six weeks of leave to care for a healthy, newborn child, each could use an additional six weeks due to his or her own serious health condition or to care for a child with a serious health condition.

(4) The expectant mother is entitled to FMLA leave for incapacity due to pregnancy, for prenatal care, or for her own serious health condition following the birth of the child. An expectant mother may take FMLA leave before the birth of the child for prenatal care or if her condition makes her unable to work. The expectant mother is entitled to leave for incapacity due to pregnancy even though she does not receive treatment from a health care provider during the absence, and even if the absence does not last for more than three consecutive calendar days.

(5) A spouse is entitled to FMLA leave if needed to care for a pregnant spouse who is incapacitated or if needed to care for her during her prenatal care, or if needed to care for her following the birth of a child if she has a serious health condition. *See* 825.124.

(6) Both parents are entitled to FMLA leave if needed to care for a child with a serious health condition if the requirements of 825.113 through 825.115 and 825.122(d) are met. Thus, spouses may each take 12 weeks of FMLA leave if needed to care for their newborn child with a serious health condition, even if both are employed by the same employing office, provided they have not exhausted their entitlements during the applicable 12-month FMLA leave period.

(b) *Intermittent and reduced schedule leave.* An eligible employee may use intermittent or reduced schedule leave after the birth to be with a healthy newborn child only if the employing office agrees. For example, an employing office and employee may agree to a part-time work schedule after the birth. If the employing office agrees to permit intermittent or reduced schedule leave for the birth of a child, the employing office may require the employee to transfer temporarily, during the period the intermittent or reduced leave schedule is required, to an available alternative position for which the employee is qualified and which better accommodates recurring periods of leave than does the employee's regular position. Transfer to an alternative position may require compliance with any applicable collective bargaining agreement and federal law (such as the Americans with Disabilities Act, as made applicable by the CAA). Transfer to an alternative position may include altering an existing job to better accommodate the employee's need for intermittent or reduced leave. The employing office's agreement is not required for intermittent leave required by the serious health condition of the expectant mother or newborn child. *See* 825.202–825.205 for general rules governing the use of intermittent and reduced schedule leave. *See* 825.121 for rules governing leave for adoption or foster care. *See* 825.601 for special rules applicable to instructional employees of schools.

825.121 Leave for adoption or foster care.

(a) *General rules.* Eligible employees are entitled to FMLA leave for placement with the employee of a son or daughter for adoption or foster care and to care for the newly placed child as follows:

(1) Employees may take FMLA leave before the actual placement or adoption of a child if an absence from work is required for the placement for adoption or foster care to proceed. For example, the employee may be required to attend counseling sessions, appear in court, consult with his or her attorney or the doctor(s) representing the birth parent, submit to a physical examination, or travel to another country to complete an adoption. The source of an adopted child (e.g., whether from a licensed placement agency or otherwise) is not a factor in determining eligibility for leave for this purpose.

(2) An employee's entitlement to leave for adoption or foster care expires at the end of the 12-month period beginning on the date of the placement. If the employing office permits leave for adoption or foster care to be taken beyond this period, such leave will not qualify as FMLA leave. Under this section, the employee is entitled to FMLA leave even if the adopted or foster child does not have a serious health condition.

(3) Spouses who are eligible for FMLA leave and are employed by the same covered employing office may be limited to a combined total of 12 weeks of leave during any 12-month period if the leave is taken for the placement of the employee's son or daughter or to care for the child after placement, for the birth of the employee's son or daughter or to care for the child after birth, or to care for the employee's parent with a serious health condition. This limitation on the total weeks of leave applies to leave taken for the reasons specified as long as the spouses are employed by the same employing office. It would apply, for example, even though the spouses are employed at two different worksites of an employing office. On

the other hand, if one spouse is ineligible for FMLA leave, the other spouse would be entitled to a full 12 weeks of FMLA leave. Where spouses both use a portion of the total 12-week FMLA leave entitlement for either the birth of a child, for placement for adoption or foster care, or to care for a parent, the spouses would each be entitled to the difference between the amount he or she has taken individually and 12 weeks for FMLA leave for other purposes. For example, if each spouse took six weeks of leave to care for a healthy, newly placed child, each could use an additional six weeks due to his or her own serious health condition or to care for a child with a serious health condition.

(4) An eligible employee is entitled to FMLA leave in order to care for an adopted or foster child with a serious health condition if the requirements of 825.113 through 825.115 and 825.122(d) are met. Thus, spouses may each take 12 weeks of FMLA leave if needed to care for an adopted or foster child with a serious health condition, even if both are employed by the same employing office, provided they have not exhausted their entitlements during the applicable 12-month FMLA leave period.

(b) *Use of intermittent and reduced schedule leave.* An eligible employee may use intermittent or reduced schedule leave after the placement of a healthy child for adoption or foster care only if the employing office agrees. Thus, for example, the employing office and employee may agree to a part-time work schedule after the placement for bonding purposes. If the employing office agrees to permit intermittent or reduced schedule leave for the placement for adoption or foster care, the employing office may require the employee to transfer temporarily, during the period the intermittent or reduced leave schedule is required, to an available alternative position for which the employee is qualified and which better accommodates recurring periods of leave than does the employee's regular position. Transfer to an alternative position may require compliance with any applicable collective bargaining agreement and federal law (such as the Americans with Disabilities Act, as made applicable by the CAA). Transfer to an alternative position may include altering an existing job to better accommodate the employee's need for intermittent or reduced leave. The employing office's agreement is not required for intermittent leave required by the serious health condition of the adopted or foster child. *See* 825.202–825.205 for general rules governing the use of intermittent and reduced schedule leave. *See* 825.120 for general rules governing leave for pregnancy and birth of a child. *See* 825.601 for special rules applicable to instructional employees of schools.

825.122 Definitions of covered servicemember, spouse, parent, son or daughter, next of kin of a covered servicemember, adoption, foster care, son or daughter on covered active duty or call to covered active duty status, son or daughter of a covered servicemember, and parent of a covered servicemember.

(a) *Covered servicemember* means:

(1) A current member of the Armed Forces, including a member of the National Guard or Reserves, who is undergoing medical treatment, recuperation or therapy, is otherwise in outpatient status, or is otherwise on the temporary disability retired list, for a serious injury or illness; or

(2) A covered veteran who is undergoing medical treatment, recuperation, or therapy for a serious injury or illness. Covered veteran means an individual who was a member of the Armed Forces (including a member of the National Guard or Reserves), and was discharged or released under conditions other than dishonorable at any time during the five-year period prior to the first date the eligible employee takes FMLA leave to care for the covered veteran. *See* 825.127(b)(2).

(b) *Spouse* means a husband or wife. For purposes of this definition, husband or wife refers to the other person with whom an individual entered into marriage as defined or recognized under state law for purposes of marriage in the State in which the marriage was entered into or, in the case of a marriage entered into outside of any State, if the marriage is valid in the place where entered into and could have been entered into in at least one State. This definition includes an individual in a same-sex or common law marriage that either:

(1) Was entered into in a State that recognizes such marriages; or

(2) If entered into outside of any State, is valid in the place where entered into and could have been entered into in at least one State.

(c) *Parent.* Parent means a biological, adoptive, step or foster father or mother, or any other individual who stood in loco parentis to the employee when the employee was a son or daughter as defined in paragraph (d) of this section. This term does not include parents ''in law.''

(d) *Son or daughter.* For purposes of FMLA leave taken for birth or adoption, or to care for a family member with a serious health condition, son or daughter means a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis, who is either under age 18, or age 18 or older and ''incapable of self-care because of a mental or physical disability'' at the time that FMLA leave is to commence.

(1) *Incapable of self-care* means that the individual requires active assistance or supervision to provide daily self-care in three or more of the activities of daily living (ADLs) or instrumental activities of daily living (IADLs). Activities of daily living include adaptive activities such as caring appropriately for one's grooming and hygiene, bathing, dressing and eating. Instrumental activities of daily living include cooking, cleaning, shopping, taking public transportation, paying bills, maintaining a residence, using telephones and directories, using a post office, etc.

(2) *Physical or mental disability* means a physical or mental impairment that substantially limits one or more of the major life activities of an individual. Regulations at 29 CFR 1630.2(h), (i), and (j), issued by the Equal Employment Opportunity Commission under the Americans with Disabilities Act (ADA), 42 U.S.C. 12101 et seq., provide guidance for these terms.

(3) Persons who are ''in loco parentis'' include those with day-to-day responsibilities to care for and financially support a child, or, in the case of an employee, who had such responsibility for the employee when the employee was a child. A biological or legal relationship is not necessary.

(e) *Next of kin* of a covered servicemember means the nearest blood relative other than the covered servicemember's spouse, parent, son, or daughter, in the following order of priority: blood relatives who have been granted legal custody of the covered servicemember by court decree or statutory provisions, brothers and sisters, grandparents, aunts and uncles, and first cousins, unless the covered servicemember has specifically designated in writing another blood relative as his or her nearest blood relative for purposes of military caregiver leave under the FMLA. When no such designation is made, and there are multiple family members with the same level of relationship to the covered servicemember, all such family members shall be considered the covered servicemember's next of kin and may take FMLA leave to provide care to the covered servicemember, either consecutively or simultaneously. When such designation has been made, the designated individual shall be deemed to be the covered servicemember's only next of kin. *See* 825.127(d)(3).

(f) *Adoption* means legally and permanently assuming the responsibility of raising a child as one's own. The source of an adopted child (e.g., whether from a licensed placement agency or otherwise) is not a factor in determining eligibility for FMLA leave. *See* 825.121 for rules governing leave for adoption.

(g) *Foster care* means 24-hour care for children in substitution for, and away from, their parents or guardian. Such placement is made by or with the agreement of the State as a result of a voluntary agreement between the parent or guardian that the child be removed from the home, or pursuant to a judicial determination of the necessity for foster care, and involves agreement between the State and foster family that the foster family will take care of the child. Although foster care may be with relatives of the child, State action is involved in the removal of the child from parental custody. *See* 825.121 for rules governing leave for foster care.

(h) Son or daughter on covered active duty or call to covered active duty status means the employee's biological, adopted, or foster child, stepchild, legal ward, or a child for whom the employee stood in loco parentis, who is on covered active duty or call to covered active duty status, and who is of any age. *See* 825.126(a)(5).

(i) Son or daughter of a covered servicemember means the covered servicemember's biological, adopted, or foster child, stepchild, legal ward, or a child for whom the covered servicemember stood in loco parentis, and who is of any age. *See* 825.127(d)(1).

(j) *Parent of a covered servicemember* means a covered servicemember's biological, adoptive, step or foster father or mother, or any other individual who stood in loco parentis to the covered servicemember. This term does not include parents ''in law.'' *See* 825.127(d)(2).

(k) *Documenting relationships.* For purposes of confirmation of family relationship, the employing office may require the employee giving notice of the need for leave to provide reasonable documentation or statement of family relationship. This documentation may take the form of a simple statement from the employee, or a child's birth certificate, a court document, etc. The employing office is entitled to examine documentation such as a birth certificate, etc., but the employee is entitled to the return of the official document submitted for this purpose.

825.123 Unable to perform the functions of the position.

(a) *Definition.* An employee is unable to perform the functions of the position where the health care provider finds that the employee is unable to work at all or is unable to perform any one of the essential functions of the employee's position within the meaning of the Americans with Disabilities Act (ADA), as amended and made applicable by Section 201(a) of the CAA (2 U.S.C. 1311(a)(3)). An employee who must be absent from work to receive medical treatment for a serious health condition is considered to be unable to perform the essential functions of the position during the absence for treatment.

(b) *Statement of functions.* An employing office has the option, in requiring certification from a health care provider, to provide a statement of the essential functions of the employee's position for the health care provider to review. A sufficient medical certification must specify what functions of the

employee's position the employee is unable to perform so that the employing office can then determine whether the employee is unable to perform one or more essential functions of the employee's position. For purposes of the FMLA, the essential functions of the employee's position are to be determined with reference to the position the employee held at the time notice is given or leave commenced, whichever is earlier. *See* 825.306.

825.124 Needed to care for a family member or covered servicemember.

(a) The medical certification provision that an employee is needed to care for a family member or covered servicemember encompasses both physical and psychological care. It includes situations where, for example, because of a serious health condition, the family member is unable to care for his or her own basic medical, hygienic, or nutritional needs or safety, or is unable to transport himself or herself to the doctor. The term also includes providing psychological comfort and reassurance which would be beneficial to a child, spouse or parent with a serious health condition who is receiving inpatient or home care.

(b) The term also includes situations where the employee may be needed to substitute for others who normally care for the family member or covered servicemember, or to make arrangements for changes in care, such as transfer to a nursing home. The employee need not be the only individual or family member available to care for the family member or covered servicemember.

(c) An employee's intermittent leave or a reduced leave schedule necessary to care for a family member or covered servicemember includes not only a situation where the condition of the family member or covered servicemember itself is intermittent, but also where the employee is only needed intermittently—such as where other care is normally available, or care responsibilities are shared with another member of the family or a third party. *See* 825.202–825.205 for rules governing the use of intermittent or reduced schedule leave.

825.125 Definition of health care provider.

(a) The FMLA, as made applicable by the CAA, defines *health care provider* as:

(1) A doctor of medicine or osteopathy who is authorized to practice medicine or surgery (as appropriate) by the State in which the doctor practices; or

(2) Any other person determined by the Office of Congressional Workplace Rights to be capable of providing health care services.

(3) In making a determination referred to in subparagraph (a)(2), and absent good cause shown to do otherwise, the Office of Congressional Workplace Rights will follow any determination made by the Department of Labor (under section 101(6)(B) of FMLA (29 U.S.C. 2611(6)(B))) that a person is capable of providing health care services, provided the determination by the Department of Labor was not made at the request of a person who was then a covered employee.

(b) Others capable of providing health care services include only:

(1) Podiatrists, dentists, clinical psychologists, optometrists, and chiropractors (limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by X-ray to exist) authorized to practice in the State and performing within the scope of their practice as defined under State law;

(2) Nurse practitioners, nurse-midwives, clinical social workers and physician assistants who are authorized to practice under State law and who are performing within the scope of their practice as defined under State law;

(3) Christian Science Practitioners listed with the First Church of Christ, Scientist in Boston, Massachusetts. Where an employee or family member is receiving treatment from a Christian Science practitioner, an employee may not object to any requirement from an employing office that the employee or family member submit to examination (though not treatment) to obtain a second or third certification from a health care provider other than a Christian Science practitioner except as otherwise provided under applicable State or local law or collective bargaining agreement;

(4) Any health care provider from whom an employing office or the employing office's group health plan's benefits manager will accept certification of the existence of a serious health condition to substantiate a claim for benefits; and

(5) A health care provider listed above who practices in a country other than the United States, who is authorized to practice in accordance with the law of that country, and who is performing within the scope of his or her practice as defined under such law.

(c) The phrase authorized to practice in the State as used in this section means that the provider must be authorized to diagnose and treat physical or mental health conditions.

825.126 Leave because of a qualifying exigency.

(a) Eligible employees may take FMLA leave for a qualifying exigency while the employee's spouse, son, daughter, or parent (the military member or member) is on covered active duty or call to covered active duty status (or has been notified of an impending call or order to covered active duty).

(1) *Covered active duty or call to covered active duty status* in the case of a member of the Regular Armed Forces means duty during the deployment of the member with the Armed Forces to a foreign country. The active duty orders of a member of the Regular components of the Armed Forces will generally specify if the member is deployed to a foreign country.

(2) *Covered active duty or call to covered active duty status* in the case of a member of the Reserve components of the Armed Forces means duty during the deployment of the member with the Armed Forces to a foreign country under a Federal call or order to active duty in support of a contingency operation pursuant to: Section 688 of Title 10 of the United States Code, which authorizes ordering to active duty retired members of the Regular Armed Forces and members of the retired Reserve who retired after completing at least 20 years of active service; Section 12301(a) of Title 10 of the United States Code, which authorizes ordering all reserve component members to active duty in the case of war or national emergency; Section 12302 of Title 10 of the United States Code, which authorizes ordering any unit or unassigned member of the Ready Reserve to active duty; Section 12304 of Title 10 of the United States Code, which authorizes ordering any unit or unassigned member of the Selected Reserve and certain members of the Individual Ready Reserve to active duty; Section 12305 of Title 10 of the United States Code, which authorizes the suspension of promotion, retirement or separation rules for certain Reserve components; Section 12406 of Title 10 of the United States Code, which authorizes calling the National Guard into Federal service in certain circumstances; chapter 15 of Title 10 of the United States Code, which authorizes calling the National Guard and state military into Federal service in the case of insurrections and national emergencies; or any other provision of law during a war or during a national emergency declared by the President or Congress so long as it is in support of a contingency operation. See 10 U.S.C. 101(a)(13)(B).

(i) For purposes of covered active duty or call to covered active duty status, the Reserve components of the Armed Forces include the Army National Guard of the United States, Army Reserve, Navy Reserve, Marine Corps Reserve, Air National Guard of the United States, Air Force Reserve and Coast Guard Reserve, and retired members of the Regular Armed Forces or Reserves who are called up in support of a contingency operation pursuant to one of the provisions of law identified in paragraph (a)(2).

(ii) The active duty orders of a member of the Reserve components will generally specify if the military member is serving in support of a contingency operation by citation to the relevant section of Title 10 of the United States Code and/or by reference to the specific name of the contingency operation and will specify that the deployment is to a foreign country.

(3) *Deployment of the member with the Armed Forces to a foreign country* means deployment to areas outside of the United States, the District of Columbia, or any Territory or possession of the United States, including international waters.

(4) A call to covered active duty for purposes of leave taken because of a qualifying exigency refers to a Federal call to active duty. State calls to active duty are not covered unless under order of the President of the United States pursuant to one of the provisions of law identified in paragraph (a)(2) of this section.

(5) *Son or daughter on covered active duty or call to covered active duty status* means the employee's biological, adopted, or foster child, stepchild, legal ward, or a child for whom the employee stood in loco parentis, who is on covered active duty or call to covered active duty status, and who is of any age.

(b) An eligible employee may take FMLA leave for one or more of the following qualifying exigencies:

(1) *Short-notice deployment.* (i) To address any issue that arises from the fact that the military member is notified of an impending call or order to covered active duty seven or less calendar days prior to the date of deployment;

(ii) Leave taken for this purpose can be used for a period of seven calendar days beginning on the date the military member is notified of an impending call or order to covered active duty;

(2) *Military events and related activities.* (i) To attend any official ceremony, program, or event sponsored by the military that is related to the covered active duty or call to covered active duty status of the military member; and

(ii) To attend family support or assistance programs and informational briefings sponsored or promoted by the military, military service organizations, or the American Red Cross that are related to the covered active duty or call to covered active duty status of the military member;

(3) *Childcare and school activities.* For the purposes of leave for childcare and school activities listed in (i) through (iv) of this paragraph, a child of the military member must be the military member's biological, adopted, or foster child, stepchild, legal ward, or child for whom the military member stands in loco parentis, who is either under 18 years of age or 18 years of age or older and incapable of self-care because of a mental or physical disability at the time that FMLA leave is to commence. As with all instances of qualifying exigency leave, the military member must be the spouse, son, daughter, or parent of the employee requesting qualifying exigency leave.

(i) To arrange for alternative childcare for a child of the military member when the covered active duty or call to covered active

duty status of the military member necessitates a change in the existing childcare arrangement;

(ii) To provide childcare for a child of the military member on an urgent, immediate need basis (but not on a routine, regular, or everyday basis) when the need to provide such care arises from the covered active duty or call to covered active duty status of the military member;

(iii) To enroll in or transfer to a new school or day care facility a child of the military member when enrollment or transfer is necessitated by the covered active duty or call to covered active duty status of the military member; and

(iv) To attend meetings with staff at a school or a daycare facility, such as meetings with school officials regarding disciplinary measures, parent-teacher conferences, or meetings with school counselors, for a child of the military member, when such meetings are necessary due to circumstances arising from the covered active duty or call to covered active duty status of the military member;

(4) *Financial and legal arrangements.* (i) To make or update financial or legal arrangements to address the military member's absence while on covered active duty or call to covered active duty status, such as preparing and executing financial and healthcare powers of attorney, transferring bank account signature authority, enrolling in the Defense Enrollment Eligibility Reporting System (DEERS), obtaining military identification cards, or preparing or updating a will or living trust; and

(ii) To act as the military member's representative before a federal, state, or local agency for purposes of obtaining, arranging, or appealing military service benefits while the military member is on covered active duty or call to covered active duty status, and for a period of 90 days following the termination of the military member's covered active duty status;

(5) *Counseling.* To attend counseling provided by someone other than a health care provider, for oneself, for the military member, or for the biological, adopted, or foster child, a stepchild, or a legal ward of the military member, or a child for whom the military member stands in loco parentis, who is either under age 18, or age 18 or older and incapable of self-care because of a mental or physical disability at the time that FMLA leave is to commence, provided that the need for counseling arises from the covered active duty or call to covered active duty status of the military member;

(6) *Rest and Recuperation.* (i) To spend time with the military member who is on short-term, temporary, Rest and Recuperation leave during the period of deployment;

(ii) Leave taken for this purpose can be used for a period of 15 calendar days beginning on the date the military member commences each instance of Rest and Recuperation leave;

(7) *Post-deployment activities.* (i) To attend arrival ceremonies, reintegration briefings and events, and any other official ceremony or program sponsored by the military for a period of 90 days following the termination of the military member's covered active duty status; and

(ii) To address issues that arise from the death of the military member while on covered active duty status, such as meeting and recovering the body of the military member, making funeral arrangements, and attending funeral services;

(8) *Parental care.* For purposes of leave for parental care listed in (i) through (iv) of this paragraph, the parent of the military member must be incapable of self-care and must be the military member's biological, adoptive, step, or foster father or mother, or any other individual who stood in loco parentis to the military member when the member was under 18 years of age. A parent who is incapable of self-care means that the parent requires active assistance or supervision to provide daily self-care in three or more of the activities of daily living or instrumental activities of daily living. Activities of daily living include adaptive activities such as caring appropriately for one's grooming and hygiene, bathing, dressing, and eating. Instrumental activities of daily living include cooking, cleaning, shopping, taking public transportation, paying bills, maintaining a residence, using telephones and directories, using a post office, etc. As with all instances of qualifying exigency leave, the military member must be the spouse, son, daughter, or parent of the employee requesting qualifying exigency leave.

(i) To arrange for alternative care for a parent of the military member when the parent is incapable of self-care and the covered active duty or call to covered active duty status of the military member necessitates a change in the existing care arrangement for the parent;

(ii) To provide care for a parent of the military member on an urgent, immediate need basis (but not on a routine, regular, or everyday basis) when the parent is incapable of self-care and the need to provide such care arises from the covered active duty or call to covered active duty status of the military member;

(iii) To admit to or transfer to a care facility a parent of the military member when admittance or transfer is necessitated by the covered active duty or call to covered active duty status of the military member; and

(iv) To attend meetings with staff at a care facility, such as meetings with hospice or social service providers for a parent of the military member, when such meetings are necessary due to circumstances arising from the covered active duty or call to covered active duty status of the military member but not for routine or regular meetings;

(9) *Additional activities.* To address other events which arise out of the military member's covered active duty or call to covered active duty status provided that the employing office and employee agree that such leave shall qualify as an exigency, and agree to both the timing and duration of such leave.

825.127 Leave to care for a covered servicemember with a serious injury or illness (military caregiver leave).

(a) Eligible employees are entitled to FMLA leave to care for a covered servicemember with a serious illness or injury.

(b) Covered servicemember means:

(1) A current member of the Armed Forces, including a member of the National Guard or Reserves, who is undergoing medical treatment, recuperation, or therapy, is otherwise in outpatient status; or is otherwise on the temporary disability retired list, for a serious injury or illness. Outpatient status means the status of a member of the Armed Forces assigned to either a military medical treatment facility as an outpatient or a unit established for the purpose of providing command and control of members of the Armed Forces receiving medical care as outpatients.

(2) A covered veteran who is undergoing medical treatment, recuperation or therapy for a serious injury or illness. Covered veteran means an individual who was a member of the Armed Forces (including a member of the National Guard or Reserves), and was discharged or released under conditions other than dishonorable at any time during the five-year period prior to the first date the eligible employee takes FMLA leave to care for the covered veteran. An eligible employee must commence leave to care for a covered veteran within five years of the veteran's active duty service, but the single 12-month period described in paragraph (e)(1) of this section may extend beyond the five-year period.

(3) For an individual who was a member of the Armed Forces (including a member of the National Guard or Reserves) and who was discharged or released under conditions other than dishonorable prior to the effective date of this Final Rule, the period between October 28, 2009 and the effective date of this Final Rule shall not count towards the determination of the five-year period for covered veteran status.

(c) A serious injury or illness means:

(1) In the case of a current member of the Armed Forces, including a member of the National Guard or Reserves, means an injury or illness that was incurred by the covered servicemember in the line of duty on active duty in the Armed Forces or that existed before the beginning of the member's active duty and was aggravated by service in the line of duty on active duty in the Armed Forces, and that may render the member medically unfit to perform the duties of the member's office, grade, rank or rating; and,

(2) In the case of a covered veteran, means an injury or illness that was incurred by the member in the line of duty on active duty in the Armed Forces (or existed before the beginning of the member's active duty and was aggravated by service in the line of duty on active duty in the Armed Forces), and manifested itself before or after the member became a veteran, and is:

(i) A continuation of a serious injury or illness that was incurred or aggravated when the covered veteran was a member of the Armed Forces and rendered the servicemember unable to perform the duties of the servicemember's office, grade, rank, or rating; or

(ii) A physical or mental condition for which the covered veteran has received a U.S. Department of Veterans Affairs Service-Related Disability Rating (VASRD) of 50 percent or greater, and such VASRD rating is based, in whole or in part, on the condition precipitating the need for military caregiver leave; or

(iii) A physical or mental condition that substantially impairs the covered veteran's ability to secure or follow a substantially gainful occupation by reason of a disability or disabilities related to military service, or would do so absent treatment; or

(iv) An injury, including a psychological injury, on the basis of which the covered veteran has been enrolled in the Department of Veterans Affairs Program of Comprehensive Assistance for Family Caregivers.

(d) In order to care for a covered servicemember, an eligible employee must be the spouse, son, daughter, or parent, or next of kin of a covered servicemember.

(1) Son or daughter of a covered servicemember means the covered servicemember's biological, adopted, or foster child, stepchild, legal ward, or a child for whom the covered servicemember stood in loco parentis, and who is of any age.

(2) Parent of a covered servicemember means a covered servicemember's biological, adoptive, step or foster father or mother, or any other individual who stood in loco parentis to the covered servicemember. This term does not include parents ''in law.''

(3) Next of kin of a covered servicemember means the nearest blood relative, other than the covered servicemember's spouse, parent, son, or daughter, in the following order of priority: blood relatives who have been granted legal custody of the servicemember

by court decree or statutory provisions, brothers and sisters, grandparents, aunts and uncles, and first cousins, unless the covered servicemember has specifically designated in writing another blood relative as his or her nearest blood relative for purposes of military caregiver leave under the FMLA. When no such designation is made, and there are multiple family members with the same level of relationship to the covered servicemember, all such family members shall be considered the covered servicemember's next of kin and may take FMLA leave to provide care to the covered servicemember, either consecutively or simultaneously. When such designation has been made, the designated individual shall be deemed to be the covered servicemember's only next of kin. For example, if a covered servicemember has three siblings and has not designated a blood relative to provide care, all three siblings would be considered the covered servicemember's next of kin. Alternatively, where a covered servicemember has a sibling(s) and designates a cousin as his or her next of kin for FMLA purposes, then only the designated cousin is eligible as the covered servicemember's next of kin. An employing office is permitted to require an employee to provide confirmation of covered family relationship to the covered servicemember pursuant to 825.122(k).

(e) An eligible employee is entitled to 26 workweeks of leave to care for a covered servicemember with a serious injury or illness during a single 12-month period.

(1) The single 12-month period described in paragraph (e) of this section begins on the first day the eligible employee takes FMLA leave to care for a covered servicemember and ends 12 months after that date, regardless of the method used by the employing office to determine the employee's 12 workweeks of leave entitlement for other FMLA-qualifying reasons. If an eligible employee does not take all of his or her 26 workweeks of leave entitlement to care for a covered servicemember during this single 12-month period, the remaining part of his or her 26 workweeks of leave entitlement to care for the covered servicemember is forfeited.

(2) The leave entitlement described in paragraph (e) of this section is to be applied on a per-covered-servicemember, per-injury basis such that an eligible employee may be entitled to take more than one period of 26 workweeks of leave if the leave is to care for different covered servicemembers or to care for the same servicemember with a subsequent serious injury or illness, except that no more than 26 workweeks of leave may be taken within any single 12-month period. An eligible employee may take more than one period of 26 workweeks of leave to care for a covered servicemember with more than one serious injury or illness only when the serious injury or illness is a subsequent serious injury or illness. When an eligible employee takes leave to care for more than one covered servicemember or for a subsequent serious injury or illness of the same covered servicemember, and the single 12-month periods corresponding to the different military caregiver leave entitlements overlap, the employee is limited to taking no more than 26 workweeks of leave in each single 12-month period.

(3) An eligible employee is entitled to a combined total of 26 workweeks of leave for any FMLA-qualifying reason during the single 12-month period described in paragraph (e) of this section, provided that the employee is entitled to no more than 12 workweeks of leave for one or more of the following: in connection with the birth of a son or daughter of the employee and in order to care for such son or daughter; in connection with the placement of a son or daughter with the employee for adoption or foster care; in order to care for the spouse, son, daughter, or parent with a serious health condition; because of the employee's own serious health condition; or because of a qualifying exigency. Thus, for example, an eligible employee may, during the single 12-month period, take 16 workweeks of FMLA leave to care for a covered servicemember and 10 workweeks of FMLA leave to care for a newborn child. However, the employee may not take more than 12 weeks of FMLA leave to care for the newborn child during the single 12-month period, even if the employee takes fewer than 14 workweeks of FMLA leave to care for a covered servicemember.

(4) In all circumstances, including for leave taken to care for a covered servicemember, the employing office is responsible for designating leave, paid or unpaid, as FMLA-qualifying, and for giving notice of the designation to the employee as provided in 825.300. In the case of leave that qualifies as both leave to care for a covered servicemember and leave to care for a family member with a serious health condition during the single 12-month period described in paragraph (e) of this section, the employing office must designate such leave as leave to care for a covered servicemember in the first instance. Leave that qualifies as both leave to care for a covered servicemember and leave taken to care for a family member with a serious health condition during the single 12-month period described in paragraph (e) of this section must not be designated and counted as both leave to care for a covered servicemember and leave to care for a family member with a serious health condition. As is the case with leave taken for other qualifying reasons, employing offices may retroactively designate leave as leave to care for a covered servicemember pursuant to 825.301(d).

(f) Spouses who are eligible for FMLA leave and are employed by the same covered employing office may be limited to a combined total of 26 workweeks of leave during the single 12-month period described in paragraph (e) of this section if the leave is taken for birth of the employee's son or daughter or to care for the child after birth, for placement of a son or daughter with the employee for adoption or foster care, or to care for the child after placement, to care for the employee's parent with a serious health condition, or to care for a covered servicemember with a serious injury or illness. This limitation on the total weeks of leave applies to leave taken for the reasons specified as long as the spouses are employed by the same employing office. It would apply, for example, even though the spouses are employed at two different worksites. On the other hand, if one spouse is ineligible for FMLA leave, the other spouse would be entitled to a full 26 workweeks of FMLA leave.

SUBPART B—EMPLOYEE LEAVE ENTITLEMENTS UNDER THE FAMILY AND MEDICAL LEAVE ACT, AS MADE APPLICABLE BY THE CONGRESSIONAL ACCOUNTABILITY ACT

825.200 Amount of Leave.

(a) Except in the case of leave to care for a covered servicemember with a serious injury or illness, an eligible employee's FMLA leave entitlement is limited to a total of 12 workweeks of leave during any 12-month period for any one, or more, of the following reasons:

(1) The birth of the employee's son or daughter, and to care for the newborn child;

(2) The placement with the employee of a son or daughter for adoption or foster care, and to care for the newly placed child;

(3) To care for the employee's spouse, son, daughter, or parent with a serious health condition;

(4) Because of a serious health condition that makes the employee unable to perform one or more of the essential functions of his or her job; and

(5) Because of any qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is a military member on covered active duty status (or has been notified of an impending call or order to covered active duty).

(b) An employing office is permitted to choose any one of the following methods for determining the 12-month period in which the 12 weeks of leave entitlement described in paragraph (a) of this section occurs:

(1) The calendar year;

(2) Any fixed 12-month leave year, such as a fiscal year or a year starting on an employee's anniversary date;

(3) The 12-month period measured forward from the date any employee's first FMLA leave under paragraph (a) begins; or

(4) A ''rolling'' 12-month period measured backward from the date an employee uses any FMLA leave as described in paragraph (a).

(c) Under methods in paragraphs (b)(1) and (b)(2) of this section an employee would be entitled to up to 12 weeks of FMLA leave at any time in the fixed 12-month period selected. An employee could, therefore, take 12 weeks of leave at the end of the year and 12 weeks at the beginning of the following year. Under the method in paragraph (b)(3) of this section, an employee would be entitled to 12 weeks of leave during the year beginning on the first date FMLA leave is taken; the next 12-month period would begin the first time FMLA leave is taken after completion of any previous 12-month period. Under the method in paragraph (b)(4) of this section, the ''rolling'' 12-month period, each time an employee takes FMLA leave the remaining leave entitlement would be any balance of the 12 weeks which has not been used during the immediately preceding 12 months. For example, if an employee has taken eight weeks of leave during the past 12 months, an additional four weeks of leave could be taken. If an employee used four weeks beginning February 1, 2008, four weeks beginning June 1, 2008, and four weeks beginning December 1, 2008, the employee would not be entitled to any additional leave until February 1, 2009. However, beginning on February 1, 2009, the employee would again be eligible to take FMLA leave, recouping the right to take the leave in the same manner and amounts in which it was used in the previous year. Thus, the employee would recoup (and be entitled to use) one additional day of FMLA leave each day for four weeks, commencing February 1, 2009. The employee would also begin to recoup additional days beginning on June 1, 2009, and additional days beginning on December 1, 2009. Accordingly, employing offices using the rolling 12-month period may need to calculate whether the employee is entitled to take FMLA leave each time that leave is requested, and employees taking FMLA leave on such a basis may fall in and out of FMLA protection based on their FMLA usage in the prior 12 months. For example, in the example above, if the employee needs six weeks of leave for a serious health condition commencing February 1, 2009, only the first four weeks of the leave would be FMLA-protected.

(d)(1) Employing offices will be allowed to choose any one of the alternatives in paragraph (b) of this section for the leave entitlements described in paragraph (a) of this section provided the alternative chosen is applied consistently and uniformly to all employees. An employing office wishing to change to another alternative is required to give at least 60 days' notice to all employees, and the transition must take place in such a

way that the employees retain the full benefit of 12 weeks of leave under whichever method affords the greatest benefit to the employee. Under no circumstances may a new method be implemented in order to avoid the CAA's FMLA leave requirements.

(2) [Reserved]

(e) If an employing office fails to select one of the options in paragraph (b) of this section for measuring the 12-month period for the leave entitlements described in paragraph (a), the option that provides the most beneficial outcome for the employee will be used. The employing office may subsequently select an option only by providing the 60-day notice to all employees of the option the employing office intends to implement. During the running of the 60-day period any other employee who needs FMLA leave may use the option providing the most beneficial outcome to that employee. At the conclusion of the 60-day period the employing office may implement the selected option.

(f) An eligible employee's FMLA leave entitlement is limited to a total of 26 workweeks of leave during a single 12-month period to care for a covered servicemember with a serious injury or illness. An employing office shall determine the single 12-month period in which the 26 weeks of leave entitlement described in this paragraph occurs using the 12-month period measured forward from the date an employee's first FMLA leave to care for the covered servicemember begins. *See* 825.127(e)(1).

(g) During the single 12-month period described in paragraph (f), an eligible employee's FMLA leave entitlement is limited to a combined total of 26 workweeks of FMLA leave for any qualifying reason. *See* 825.127(e)(3).

(h) For purposes of determining the amount of leave used by an employee, the fact that a holiday may occur within the week taken as FMLA leave has no effect; the week is counted as a week of FMLA leave. However, if an employee is using FMLA leave in increments of less than one week, the holiday will not count against the employee's FMLA entitlement unless the employee was otherwise scheduled and expected to work during the holiday. Similarly, if for some reason the employing office's business activity has temporarily ceased and employees generally are not expected to report for work for one or more weeks (e.g., a school closing two weeks for the Christmas/New Year holiday or the summer vacation or an employing office closing the office for repairs), the days the employing office's activities have ceased do not count against the employee's FMLA leave entitlement. Methods for determining an employee's 12-week leave entitlement are also described in 825.205.

(i)(1) If employing offices jointly employ an employee, and if they designate a primary employing office pursuant to 825.106(c), the primary employing office may choose any one of the alternatives in paragraph (b) of this section for measuring the 12-month period, provided that the alternative chosen is applied consistently and uniformly to all employees of the primary employing office including the jointly employed employee.

(2) If employing offices fail to designate a primary employing office pursuant to 825.106(c), an employee jointly employed by the employing offices may, by so notifying one of the employing offices, select that employing office to be the primary employing office of the employee for purposes of the application of paragraphs (d) and (e) of this section.

(j) If, before beginning employment with an employing office, an employee had been employed by another employing office, the subsequent employing office may count against the employee's FMLA leave entitlement FMLA leave taken from the prior employing office, so long as the prior employing office properly designated the leave as FMLA under these regulations or other applicable requirements.

825.201 Leave to care for a parent.

(a) *General rule.* An eligible employee is entitled to FMLA leave if needed to care for the employee's parent with a serious health condition. Care for parents-in-law is not covered by the FMLA. *See* 825.122(c) for definition of parent.

(b) *Same employing office limitation.* Spouses who are eligible for FMLA leave and are employed by the same covered employing office may be limited to a combined total of 12 weeks of leave during any 12-month period if the leave is taken to care for the employee's parent with a serious health condition, for the birth of the employee's son or daughter or to care for the child after the birth, or for placement of a son or daughter with the employee for adoption or foster care or to care for the child after placement. This limitation on the total weeks of leave applies to leave taken for the reasons specified as long as the spouses are employed by the same employing office. It would apply, for example, even though the spouses are employed at two different worksites of an employing office. On the other hand, if one spouse is ineligible for FMLA leave, the other spouse would be entitled to a full 12 weeks of FMLA leave. Where the spouses both use a portion of the total 12-week FMLA leave entitlement for either the birth of a child, for placement for adoption or foster care, or to care for a parent, the spouses would each be entitled to the difference between the amount he or she has taken individually and 12 weeks for FMLA leave for other purposes. For example, if each spouse took six weeks of leave to care for a parent, each could use an additional six weeks due to his or her own serious health condition or to care for a child with a serious health condition. *See also* 825.127(d).

825.202 Intermittent leave or reduced leave schedule.

(a) *Definition.* FMLA leave may be taken intermittently or on a reduced leave schedule under certain circumstances. Intermittent leave is FMLA leave taken in separate blocks of time due to a single qualifying reason. A reduced leave schedule is a leave schedule that reduces an employee's usual number of working hours per workweek, or hours per workday. A reduced leave schedule is a change in the employee's schedule for a period of time, normally from full-time to part-time.

(b) *Medical necessity.* For intermittent leave or leave on a reduced leave schedule taken because of one's own serious health condition, to care for a spouse, parent, son, or daughter with a serious health condition, or to care for a covered servicemember with a serious injury or illness, there must be a medical need for leave and it must be that such medical need can be best accommodated through an intermittent or reduced leave schedule. The treatment regimen and other information described in the certification of a serious health condition and in the certification of a serious injury or illness, if required by the employing office, addresses the medical necessity of intermittent leave or leave on a reduced leave schedule. *See* 825.306, 825.310. Leave may be taken intermittently or on a reduced leave schedule when medically necessary for planned and/or unanticipated medical treatment of a serious health condition or of a covered servicemember's serious injury or illness, or for recovery from treatment or recovery from a serious health condition or a covered servicemember's serious injury or illness. It may also be taken to provide care or psychological comfort to a covered family member with a serious health condition or a covered servicemember with a serious injury or illness.

(1) Intermittent leave may be taken for a serious health condition of a spouse, parent, son, or daughter, for the employee's own serious health condition, or a serious injury or illness of a covered servicemember which requires treatment by a health care provider periodically, rather than for one continuous period of time, and may include leave of periods from an hour or more to several weeks. Examples of intermittent leave would include leave taken on an occasional basis for medical appointments, or leave taken several days at a time spread over a period of six months, such as for chemotherapy. A pregnant employee may take leave intermittently for prenatal examinations or for her own condition, such as for periods of severe morning sickness. An example of an employee taking leave on a reduced leave schedule is an employee who is recovering from a serious health condition and is not strong enough to work a full-time schedule.

(2) Intermittent or reduced schedule leave may be taken for absences where the employee or family member is incapacitated or unable to perform the essential functions of the position because of a chronic serious health condition or a serious injury or illness of a covered servicemember, even if he or she does not receive treatment by a health care provider. *See* 825.113 and 825.127.

(c) *Birth or placement.* When leave is taken after the birth of a healthy child or placement of a healthy child for adoption or foster care, an employee may take leave intermittently or on a reduced leave schedule only if the employing office agrees. Such a schedule reduction might occur, for example, where an employee, with the employing office's agreement, works part-time after the birth of a child, or takes leave in several segments. The employing office's agreement is not required, however, for leave during which the expectant mother has a serious health condition in connection with the birth of her child or if the newborn child has a serious health condition. *See* 825.204 for rules governing transfer to an alternative position that better accommodates intermittent leave. *See also* 825.120 (pregnancy) and 825.121 (adoption and foster care).

(d) *Qualifying exigency.* Leave due to a qualifying exigency may be taken on an intermittent or reduced leave schedule basis.

825.203 Scheduling of intermittent or reduced schedule leave.

Eligible employees may take FMLA leave on an intermittent or reduced schedule basis when medically necessary due to the serious health condition of a covered family member or the employee or the serious injury or illness of a covered servicemember. *See* 825.202. Eligible employees may also take FMLA leave on an intermittent or reduced schedule basis when necessary because of a qualifying exigency. If an employee needs leave intermittently or on a reduced leave schedule for planned medical treatment, then the employee must make a reasonable effort to schedule the treatment so as not to disrupt unduly the employing office's operations.

825.204 Transfer of an employee to an alternative position during intermittent leave or reduced schedule leave.

(a) *Transfer or reassignment.* If an employee needs intermittent leave or leave on a reduced leave schedule that is foreseeable based on planned medical treatment for the employee, a family member, or a covered servicemember, including during a period of recovery from one's own serious health condition, a serious health condition of a

spouse, parent, son, or daughter, or a serious injury or illness of a covered servicemember, or if the employing office agrees to permit intermittent or reduced schedule leave for the birth of a child or for placement of a child for adoption or foster care, the employing office may require the employee to transfer temporarily, during the period the intermittent or reduced leave schedule is required, to an available alternative position for which the employee is qualified and which better accommodates recurring periods of leave than does the employee's regular position. *See* 825.601 for special rules applicable to instructional employees of schools.

(b) *Compliance.* Transfer to an alternative position may require compliance with any applicable collective bargaining agreement and Federal law (such as the Americans with Disabilities Act, as made applicable by the CAA). Transfer to an alternative position may include altering an existing job to better accommodate the employee's need for intermittent or reduced scheduled leave.

(c) *Equivalent pay and benefits.* The alternative position must have equivalent pay and benefits. An alternative position for these purposes does not have to have equivalent duties. The employing office may increase the pay and benefits of an existing alternative position, so as to make them equivalent to the pay and benefits of the employee's regular job. The employing office may also transfer the employee to a part-time job with the same hourly rate of pay and benefits, provided the employee is not required to take more leave than is medically necessary. For example, an employee desiring to take leave in increments of four hours per day could be transferred to a half-time job, or could remain in the employee's same job on a part-time schedule, paying the same hourly rate as the employee's previous job and enjoying the same benefits. The employing office may not eliminate benefits which otherwise would not be provided to part-time employees; however, an employing office may proportionately reduce benefits such as vacation leave where an employing office's normal practice is to base such benefits on the number of hours worked.

(d) *Employing office limitations.* An employing office may not transfer the employee to an alternative position in order to discourage the employee from taking leave or otherwise work a hardship on the employee. For example, a white collar employee may not be assigned to perform laborer's work; an employee working the day shift may not be reassigned to the graveyard shift; an employee working in the headquarters facility may not be reassigned to a branch a significant distance away from the employee's normal job location. Any such attempt on the part of the employing office to make such a transfer will be held to be contrary to the prohibited acts provisions of the FMLA, as made applicable by the CAA.

(e) *Reinstatement of employee.* When an employee who is taking leave intermittently or on a reduced leave schedule and has been transferred to an alternative position no longer needs to continue on leave and is able to return to full-time work, the employee must be placed in the same or equivalent job as the job he or she left when the leave commenced. An employee may not be required to take more leave than necessary to address the circumstance that precipitated the need for leave.

825.205 Increments of FMLA leave for intermittent or reduced schedule leave.

(a) *Minimum increment.* (1) When an employee takes FMLA leave on an intermittent or reduced leave schedule basis, the employing office must account for the leave using an increment no greater than the shortest period of time that the employing office uses to account for use of other forms of leave provided that it is not greater than one hour and provided further that an employee's FMLA leave entitlement may not be reduced by more than the amount of leave actually taken. An employing office may not require an employee to take more leave than is necessary to address the circumstances that precipitated the need for the leave, provided that the leave is counted using the shortest increment of leave used to account for any other type of leave. *See also* 825.205(a)(2) for the physical impossibility exception, and 825.600 and 825.601 for special rules applicable to employees of schools. If an employing office uses different increments to account for different types of leave, the employing office must account for FMLA leave in the smallest increment used to account for any other type of leave. For example, if an employing office accounts for the use of annual leave in increments of one hour and the use of sick leave in increments of one-half hour, then FMLA leave use must be accounted for using increments no larger than one-half hour. If an employing office accounts for use of leave in varying increments at different times of the day or shift, the employing office may also account for FMLA leave in varying increments, provided that the increment used for FMLA leave is no greater than the smallest increment used for any other type of leave during the period in which the FMLA leave is taken. If an employing office accounts for other forms of leave use in increments greater than one hour, the employing office must account for FMLA leave use in increments no greater than one hour. An employing office may account for FMLA leave in shorter increments than used for other forms of leave. For example, an employing office that accounts for other forms of leave in one hour increments may account for FMLA leave in a shorter increment when the employee arrives at work several minutes late, and the employing office wants the employee to begin work immediately. Such accounting for FMLA leave will not alter the increment considered to be the shortest period used to account for other forms of leave or the use of FMLA leave in other circumstances. In all cases, employees may not be charged FMLA leave for periods during which they are working.

(2) Where it is physically impossible for an employee using intermittent leave or working a reduced leave schedule to commence or end work mid-way through a shift, such as where a flight attendant or a railroad conductor is scheduled to work aboard an airplane or train, or a laboratory employee is unable to enter or leave a sealed ''clean room'' during a certain period of time and no equivalent position is available, the entire period that the employee is forced to be absent is designated as FMLA leave and counts against the employee's FMLA entitlement. The period of the physical impossibility is limited to the period during which the employing office is unable to permit the employee to work prior to a period of FMLA leave or return the employee to the same or equivalent position due to the physical impossibility after a period of FMLA leave. *See* 825.214.

(b) *Calculation of leave.* (1) When an employee takes leave on an intermittent or reduced leave schedule, only the amount of leave actually taken may be counted toward the employee's leave entitlement. The actual workweek is the basis of leave entitlement. Therefore, if an employee who would otherwise work 40 hours a week takes off eight hours, the employee would use one-fifth (⅕) of a week of FMLA leave. Similarly, if a full-time employee who would otherwise work eight hour days works four-hour days under a reduced leave schedule, the employee would use one half (½) week of FMLA leave each week. Where an employee works a part-time schedule or variable hours, the amount of FMLA leave that an employee uses is determined on a pro rata or proportional basis. If an employee who would otherwise work 30 hours per week, but works only 20 hours a week under a reduced leave schedule, the employee's 10 hours of leave would constitute one-third (⅓) of a week of FMLA leave for each week the employee works the reduced leave schedule. An employing office may convert these fractions to their hourly equivalent so long as the conversion equitably reflects the employee's total normally scheduled hours. An employee does not accrue FMLA-protected leave at any particular hourly rate. An eligible employee is entitled to up to a total of 12 workweeks of leave, or 26 workweeks in the case of military caregiver leave, and the total number of hours contained in those workweeks is necessarily dependent on the specific hours the employee would have worked but for the use of leave. *See also* 825.601 and 825.602 on special rules for schools.

(2) If an employing office has made a permanent or long-term change in the employee's schedule (for reasons other than FMLA, and prior to the notice of need for FMLA leave), the hours worked under the new schedule are to be used for making this calculation.

(3) If an employee's schedule varies from week to week to such an extent that an employing office is unable to determine with any certainty how many hours the employee would otherwise have worked (but for the taking of FMLA leave), a weekly average of the hours worked over the 12 months prior to the beginning of the leave period (including any hours for which the employee took leave of any type) would be used for calculating the employee's leave entitlement.

(c) *Overtime.* If an employee would normally be required to work overtime, but is unable to do so because of a FMLA-qualifying reason that limits the employee's ability to work overtime, the hours which the employee would have been required to work may be counted against the employee's FMLA entitlement. In such a case, the employee is using intermittent or reduced schedule leave. For example, if an employee would normally be required to work for 48 hours in a particular week, but due to a serious health condition the employee is unable to work more than 40 hours that week, the employee would utilize eight hours of FMLA-protected leave out of the 48-hour workweek, or one-sixth (⅙) of a week of FMLA leave. Voluntary overtime hours that an employee does not work due to an FMLA-qualifying reason may not be counted against the employee's FMLA leave entitlement.

825.206 Interaction with the FLSA, as made applicable by the Congressional Accountability Act.

(a) Leave taken under FMLA, as made applicable by the CAA, may be unpaid. If an employee is otherwise exempt from minimum wage and overtime requirements of the Fair Labor Standards Act (FLSA), as made applicable by the CAA, and as exempt under regulations issued by the Board, at part 541, providing unpaid FMLA-qualifying leave to such an employee will not cause the employee to lose the FLSA exemption. This means that under regulations currently in effect, where an employee meets the specified duties test, is paid on a salary basis, and is paid a salary of at least the amount specified in the regulations, the employing office may make deductions from the employee's salary for any hours taken as intermittent

or reduced FMLA leave within a workweek, without affecting the exempt status of the employee.

(b) For an employee paid in accordance with a fluctuating workweek method of payment for overtime, where permitted by section 203 of the CAA (2 U.S.C. 1313), the employing office, during the period in which intermittent or reduced schedule FMLA leave is scheduled to be taken, may compensate an employee on an hourly basis and pay only for the hours the employee works, including time and one-half the employee's regular rate for overtime hours. The change to payment on an hourly basis would include the entire period during which the employee is taking intermittent leave, including weeks in which no leave is taken. The hourly rate shall be determined by dividing the employee's weekly salary by the employee's normal or average schedule of hours worked during weeks in which FMLA leave is not being taken. If an employing office chooses to follow this exception from the fluctuating workweek method of payment, the employing office must do so uniformly, with respect to all employees paid on a fluctuating workweek basis for whom FMLA leave is taken on an intermittent or reduced leave schedule basis. If an employing office does not elect to convert the employee's compensation to hourly pay, no deduction may be taken for FMLA leave absences. Once the need for intermittent or reduced scheduled leave is over, the employee may be restored to payment on a fluctuating workweek basis.

(c) This special exception to the salary basis requirements of the FLSA exemption or fluctuating workweek payment requirements applies only to employees of covered employing offices who are eligible for FMLA leave, and to leave which qualifies as FMLA leave. Hourly or other deductions which are not in accordance with the Board's FLSA regulations at part 541 or with a permissible fluctuating workweek method of payment for overtime may not be taken, for example, where the employee has not worked long enough to be eligible for FMLA leave without potentially affecting the employee's eligibility for exemption. Nor may deductions which are not permitted by the Board's FLSA regulations at part 541 or by a permissible fluctuating workweek method of payment for overtime be taken from such an employee's salary for any leave which does not qualify as FMLA leave, for example, deductions from an employee's pay for leave required under an employing office's policy or practice for a reason which does not qualify as FMLA leave, e.g., leave to care for a grandparent or for a medical condition which does not qualify as a serious health condition or serious injury or illness; or for leave which is more generous than provided by the FMLA, as made applicable by the CAA. Employing offices may comply with the employing office's own policy/practice under these circumstances and maintain the employee's eligibility for exemption or for the fluctuating workweek method of pay by not taking hourly deductions from the employee's pay, in accordance with FLSA requirements, as made applicable by the CAA, or may take such deductions, treating the employee as an hourly employee and pay overtime premium pay for hours worked over 40 in a workweek.

825.207 Substitution of paid leave, generally.

(a) Generally, FMLA leave is unpaid leave. However, under the circumstances described in this section, the FMLA, as made applicable by the CAA, permits an eligible employee to choose to substitute accrued paid leave for unpaid FMLA leave. Subject to 825.208, if an employee does not choose to substitute accrued paid leave, the employing office may require the employee to substitute accrued paid leave for unpaid FMLA leave. The term substitute means that the paid leave provided by the employing office, and accrued pursuant to established policies of the employing office, will run concurrently with the unpaid FMLA leave. Accordingly, the employee receives pay pursuant to the employing office's applicable paid leave policy during the period of otherwise unpaid FMLA leave. An employee's ability to substitute accrued paid leave is determined by the terms and conditions of the employing office's normal leave policy. When an employee chooses, or an employing office requires, substitution of accrued paid leave, the employing office must inform the employee that the employee must satisfy any procedural requirements of the paid leave policy only in connection with the receipt of such payment. *See* 825.300(c). If an employee does not comply with the additional requirements in an employing office's paid leave policy, the employee is not entitled to substitute accrued paid leave, but the employee remains entitled to take unpaid FMLA leave. Employing offices may not discriminate against employees on FMLA leave in the administration of their paid leave policies.

(b) If neither the employee nor the employing office elects to substitute paid leave for unpaid FMLA leave under the above conditions and circumstances, the employee will remain entitled to all the paid leave which is earned or accrued under the terms of the employing office's plan.

(c) If an employee uses paid leave under circumstances which do not qualify as FMLA leave, the leave will not count against the employee's FMLA leave entitlement. For example, paid sick leave used for a medical condition which is not a serious health condition or serious injury or illness does not count against the employee's FMLA leave entitlement.

(d) Leave taken pursuant to a disability leave plan would be considered FMLA leave for a serious health condition and counted in the leave entitlement permitted under FMLA if it meets the criteria set forth above in 825.112 through 825.115. In such cases, the employing office may designate the leave as FMLA leave and count the leave against the employee's FMLA leave entitlement. Because leave pursuant to a disability benefit plan is not unpaid, the provision for substitution of the employee's accrued paid leave is inapplicable, and neither the employee nor the employing office may require the substitution of paid leave. However, employing offices and employees may agree to have paid leave supplement the disability plan benefits, such as in the case where a plan only provides replacement income for two-thirds of an employee's salary.

(e) The FMLA, as made applicable by the CAA, provides that a serious health condition may result from injury to the employee on or off the job. If the employing office designates the leave as FMLA leave in accordance with 825.300(d), the leave counts against the employee's FMLA leave entitlement. Because the workers' compensation absence is not unpaid, the provision for substitution of the employee's accrued paid leave is not applicable, and neither the employee nor the employing office may require the substitution of paid leave. However, employing offices and employees may agree, to have paid leave supplement workers' compensation benefits, such as in the case where workers' compensation only provides replacement income for two-thirds of an employee's salary. If the health care provider treating the employee for the workers' compensation injury certifies the employee is able to return to a light duty job but is unable to return to the same or equivalent job, the employee may decline the employing office's offer of a light duty job. As a result, the employee may lose workers' compensation payments, but is entitled to remain on unpaid FMLA leave until the employee's FMLA leave entitlement is exhausted. As of the date workers' compensation benefits cease, the substitution provision becomes applicable and either the employee may elect or the employing office may require the use of accrued paid leave. *See also* 825.210(f), 825.216(d), 825.220(d), 825.307(a) and 825.702 (d)(1) and (2) regarding the relationship between workers' compensation absences and FMLA leave.

(f) Under the FLSA, as made applicable by the CAA, an employing office always has the right to cash out an employee's compensatory time or to require the employee to use the time. Therefore, if an employee requests and is permitted to use accrued compensatory time to receive pay for time taken off for an FMLA reason, or if the employing office requires such use pursuant to the FLSA, the time taken may be counted against the employee's FMLA leave entitlement.

825.208 Substitution of paid leave—special rule for paid parental leave.

(a) This section applies to births or placements occurring on or after October 1, 2020.

(b) This section provides the basis for determining the periods of unpaid leave for which paid parental leave or accrued paid leave may be substituted in connection with:

(1) The birth of a son or daughter, and to care for the newborn child (*See* 825.120); or

(2) The placement of a son or daughter with the employee for adoption or foster care and the care of such son or daughter (*See* 825.121);

(c) *Leave connected to birth or placement.* For unpaid leave described in paragraph (b) of this section, an employee may elect to substitute—

(1) Up to 12 workweeks of paid parental leave in connection with the occurrence of a birth or placement, and

(2) Any additional paid annual, vacation, personal, family, medical, or sick leave provided by the employing office to such employee.

(d) *Leave entitlement.* Since an employee may use only 12 weeks of unpaid FMLA leave in any 12-month period under 825.200(a), any use of unpaid FMLA leave not associated with paid parental leave may affect an employee's ability to use the full 12 weeks of paid parental leave within a single 12-month period. The specific amount of paid parental leave available will depend on when the employee uses various types of unpaid FMLA leave relative to any 12-month period established under 825.200(b).

(e) *Employee entitlement to substitute.* (1) An employee is entitled to substitute paid leave for leave without pay as provided in paragraph (c) of this section.

(2) An employing office may not require that an employee first use all or any portion of the leave described in subparagraph (c)(2) of this section before being allowed to use the leave described in subparagraph (c)(1) of this section.

(3) An employing office may not require an employee to substitute paid leave for leave without pay as described in subparagraph (c)(2) of this section.

(4) An employee may request to use annual, vacation, personal, family, medical, or sick leave for the reasons described in paragraph (b) of this section without invoking family and medical leave, and, in that case, the employing office exercises its normal authority with respect to approving or disapproving the timing of when the leave may be used. If the employing office grants the leave request, it must designate whether any leave granted is FMLA leave, in accordance with sections 825.300 and 825.301.

(f) *Notification by employee and retroactive substitution*. (1) An employee must notify the employing office of the employee's election to substitute paid leave for leave without pay under this section prior to the date such paid leave commences (i.e., no retroactive substitution), except as provided in paragraphs (f)(2) and (f)(3) of this section, and provided such retroactive substitution does not violate any applicable law or regulation.

(2) An employee may retroactively substitute paid leave for leave without pay as permitted in paragraph (c) of this section, if the substitution is made in conjunction with the retroactive granting of leave without pay.

(3) An employee may retroactively substitute transferred (donated) annual leave for leave without pay granted under this subpart.

(g) *Pay during leave*. The pay an employee receives when using paid parental leave shall be the same pay the employee would receive if the employee were using annual leave.

(h) *Treatment of unused leave*. If an employee has any unused balance of paid parental leave that remains at the end of the 12-month period following the birth or placement involved, the entitlement to the unused leave elapses at that time. No payment may be made for unused paid parental leave that has expired. Paid parental leave may not be considered annual leave for purposes of making a lump-sum payment for annual leave or for any other purpose. The forfeiture of any unused balance of paid parental leave does not impact an employee's ability to use unpaid FMLA leave for other qualifying reasons, if eligible pursuant to 825.110, 825.112 and 825.200.

(i) *Employing office responsibilities*. An employing office that has employees covered by this subpart is responsible for the proper administration of 825.208, including the responsibility of informing employees of their entitlements and obligations.

(j) *Library of Congress*. The OCWR will defer to supplemental regulations on paid parental leave issued by the Library of Congress pursuant to the authority in 29 USC 2617, provided those supplemental regulations are consistent with the regulations in this subpart.

(k) *Work obligation*. Paid parental leave under this subpart shall apply without regard to:

(1) the limitations in subparagraphs (E), (F), or (G) of section 6382(d)(2) of title 5, United States Code (requiring employees of executive branch agencies to agree in writing to work for the executive branch agency for at least 12 months after returning from leave); or

(2) the limitations in 825.213 (permitting employing offices to recover an amount equal to the total amount of government contributions for maintaining such employee's health coverage if the employee fails to return from leave).

(l) *Cases of employee incapacitation*. (1) If an employing office determines that an otherwise eligible employee who could have made an election for a past leave period to substitute paid parental leave (as provided in paragraph (c) of this section) was physically or mentally incapable of doing so during that past period, the employee may, within 5 workdays of the employee's return to duty status, make an election to substitute paid parental leave for applicable unpaid FMLA leave under paragraph (c) of this section on a retroactive basis, provided such retroactive substitution does not violate any applicable law or regulation. Such a retroactive election shall be effective on the date that such an election would have been effective if the employee had not been incapacitated at the time.

(2) If an employing office learns that an otherwise eligible employee is physically or mentally incapable of making an election to substitute paid parental leave (as provided in 825.207), the employing office must, upon the request of a personal representative of the employee, provide conditional approval of substitution of paid parental leave for applicable unpaid FMLA leave on a prospective basis. The conditional approval is based on the presumption that the employee would have elected to substitute paid parental leave for the applicable unpaid FMLA leave. An employee may, within 5 workdays of the employee's return to duty status, request to substitute other leave for the paid parental leave.

(m) *Cases of multiple children born or placed in the same time period*. (1) If an employee has multiple children born or placed on the same day, the multiple-child birth/placement event is considered to be a single event that triggers a single entitlement of up to 12 weeks of paid parental leave under paragraph (d) of this section.

(2) If an employee has one or more children born or placed during the 12-month period following the date of an earlier birth or placement of a child of the employee, the provisions of this subpart shall be independently administered for each birth or placement event.

825.209 Maintenance of employee benefits.

(a) During any FMLA leave, an employing office must maintain the employee's coverage under the Federal Employees Health Benefits Program or any group health plan (as defined in the Internal Revenue Code of 1986 at 26 U.S.C. 5000(b)(1)) on the same conditions as coverage would have been provided if the employee had been continuously employed during the entire leave period. All employing offices are subject to the requirements of the FMLA, as made applicable by the CAA, to maintain health coverage. The definition of group health plan is set forth in 825.102. For purposes of FMLA, the term group health plan shall not include an insurance program providing health coverage under which employees purchase individual policies from insurers provided that:

(1) No contributions are made by the employing office;

(2) Participation in the program is completely voluntary for employees;

(3) The sole functions of the employing office with respect to the program are, without endorsing the program, to permit the insurer to publicize the program to employees, to collect premiums through payroll deductions and to remit them to the insurer;

(4) The employing office receives no consideration in the form of cash or otherwise in connection with the program, other than reasonable compensation, excluding any profit, for administrative services actually rendered in connection with payroll deduction; and

(5) The premium charged with respect to such coverage does not increase in the event the employment relationship terminates.

(b) The same group health plan benefits provided to an employee prior to taking FMLA leave must be maintained during the FMLA leave. For example, if family member coverage is provided to an employee, family member coverage must be maintained during the FMLA leave. Similarly, benefit coverage during FMLA leave for medical care, surgical care, hospital care, dental care, eye care, mental health counseling, substance abuse treatment, etc., must be maintained during leave if provided in an employing office's group health plan, including a supplement to a group health plan, whether or not provided through a flexible spending account or other component of a cafeteria plan.

(c) If an employing office provides a new health plan or benefits or changes health benefits or plans while an employee is on FMLA leave, the employee is entitled to the new or changed plan/benefits to the same extent as if the employee were not on leave. For example, if an employing office changes a group health plan so that dental care becomes covered under the plan, an employee on FMLA leave must be given the same opportunity as other employees to receive (or obtain) the dental care coverage. Any other plan changes (e.g., in coverage, premiums, deductibles, etc.) which apply to all employees of the workforce would also apply to an employee on FMLA leave.

(d) Notice of any opportunity to change plans or benefits must also be given to an employee on FMLA leave. If the group health plan permits an employee to change from single to family coverage upon the birth of a child or otherwise add new family members, such a change in benefits must be made available while an employee is on FMLA leave. If the employee requests the changed coverage it must be provided by the employing office.

(e) An employee may choose not to retain group health plan coverage during FMLA leave. However, when an employee returns from leave, the employee is entitled to be reinstated on the same terms as prior to taking the leave, including family or dependent coverages, without any qualifying period, physical examination, exclusion of pre-existing conditions, etc. *See* 825.212(c).

(f) Except as required by the Consolidated Omnibus Budget Reconciliation Act of 1986 (COBRA) or 5 U.S.C. 8905a, whichever is applicable, and for key employees (as discussed below), an employing office's obligation to maintain health benefits during leave (and to restore the employee to the same or equivalent employment) under FMLA ceases if and when the employment relationship would have terminated if the employee had not taken FMLA leave (e.g., if the employee's position is eliminated as part of a nondiscriminatory reduction in force and the employee would not have been transferred to another position); an employee informs the employing office of his or her intent not to return from leave (including before starting the leave if the employing office is so informed before the leave starts); or the employee fails to return from leave or continues on leave after exhausting his or her FMLA leave entitlement in the 12-month period.

(g) If a key employee (*See* 825.218) does not return from leave when notified by the employing office that substantial or grievous economic injury will result from his or her reinstatement, the employee's entitlement to group health plan benefits continues unless and until the employee advises the employing office that the employee does not desire restoration to employment at the end of the leave period, or the FMLA leave entitlement is exhausted, or reinstatement is actually denied.

(h) An employee's entitlement to benefits other than group health benefits during a period of FMLA leave (e.g., holiday pay) is to be determined by the employing office's established policy for providing such benefits when the employee is on other forms of leave (paid or unpaid, as appropriate).

825.210 Employee payment of group health benefit premiums.

(a) Group health plan benefits must be maintained on the same basis as coverage would have been provided if the employee had been continuously employed during the FMLA leave period. Therefore, any share of group health plan premiums which had been paid by the employee prior to FMLA leave

must continue to be paid by the employee during the FMLA leave period. If premiums are raised or lowered, the employee would be required to pay the new premium rates. Maintenance of health insurance policies which are not a part of the employing office's group health plan, as described in 825.209(a), are the sole responsibility of the employee. The employee and the insurer should make necessary arrangements for payment of premiums during periods of unpaid FMLA leave.

(b) If the FMLA leave is substituted paid leave, the employee's share of premiums must be paid by the method normally used during any paid leave, presumably as a payroll deduction.

(c) If FMLA leave is unpaid, the employing office has a number of options for obtaining payment from the employee. The employing office may require that payment be made to the employing office or to the insurance carrier, but no additional charge may be added to the employee's premium payment for administrative expenses. The employing office may require employees to pay their share of premium payments in any of the following ways:

(1) Payment would be due at the same time as it would be made if by payroll deduction;

(2) Payment would be due on the same schedule as payments are made under COBRA or 5 U.S.C. 8905a, whichever is applicable;

(3) Payment would be prepaid pursuant to a cafeteria plan at the employee's option;

(4) The employing office's existing rules for payment by employees on leave without pay would be followed, provided that such rules do not require prepayment (i.e., prior to the commencement of the leave) of the premiums that will become due during a period of unpaid FMLA leave or payment of higher premiums than if the employee had continued to work instead of taking leave; or

(5) Another system voluntarily agreed to between the employing office and the employee, which may include prepayment of premiums (e.g., through increased payroll deductions when the need for the FMLA leave is foreseeable).

(d) The employing office must provide the employee with advance written notice of the terms and conditions under which these payments must be made. *See* 825. 300(c).

(e) An employing office may not require more of an employee using unpaid FMLA leave than the employing office requires of other employees on leave without pay.

(f) An employee who is receiving payments as a result of a workers' compensation injury must make arrangements with the employing office for payment of group health plan benefits when simultaneously taking FMLA leave. *See* 825.207(e).

825.211 Maintenance of benefits under multi-employer health plans.

(a) A multi-employer health plan is a plan to which more than one employing office is required to contribute, and which is maintained pursuant to one or more collective bargaining agreements between employee organization(s) and the employing offices.

(b) An employing office under a multi-employer plan must continue to make contributions on behalf of an employee using FMLA leave as though the employee had been continuously employed, unless the plan contains an explicit FMLA provision for maintaining coverage such as through pooled contributions by all employing offices party to the plan.

(c) During the duration of an employee's FMLA leave, coverage by the group health plan, and benefits provided pursuant to the plan, must be maintained at the level of coverage and benefits which were applicable to the employee at the time FMLA leave commenced.

(d) An employee using FMLA leave cannot be required to use banked hours or pay a greater premium than the employee would have been required to pay if the employee had been continuously employed.

(e) As provided in 825.209(f) of this part, group health plan coverage must be maintained for an employee on FMLA leave until:

(1) The employee's FMLA leave entitlement is exhausted;

(2) The employing office can show that the employee would have been laid off and the employment relationship terminated; or

(3) The employee provides unequivocal notice of intent not to return to work.

825.212 Employee failure to pay health plan premium payments.

(a)(1) In the absence of an established employing office policy providing a longer grace period, an employing office's obligations to maintain health insurance coverage cease under FMLA if an employee's premium payment is more than 30 days late. In order to drop the coverage for an employee whose premium payment is late, the employing office must provide written notice to the employee that the payment has not been received. Such notice must be mailed to the employee at least 15 days before coverage is to cease, advising that coverage will be dropped on a specified date at least 15 days after the date of the letter unless the payment has been received by that date. If the employing office has established policies regarding other forms of unpaid leave that provide for the employing office to cease coverage retroactively to the date the unpaid premium payment was due, the employing office may drop the employee from coverage retroactively in accordance with that policy, provided the 15-day notice was given. In the absence of such a policy, coverage for the employee may be terminated at the end of the 30-day grace period, where the required 15-day notice has been provided.

(2) An employing office has no obligation regarding the maintenance of a health insurance policy which is not a group health plan. *See* 825.209(a).

(3) All other obligations of an employing office under FMLA would continue; for example, the employing office continues to have an obligation to reinstate an employee upon return from leave.

(b) The employing office may recover the employee's share of any premium payments missed by the employee for any FMLA leave period during which the employing office maintains health coverage by paying the employee's share after the premium payment is missed.

(c) If coverage lapses because an employee has not made required premium payments, upon the employee's return from FMLA leave the employing office must still restore the employee to coverage/benefits equivalent to those the employee would have had if leave had not been taken and the premium payment(s) had not been missed, including family or dependent coverage. *See* 825.215(d)(1)–(5). In such case, an employee may not be required to meet any qualification requirements imposed by the plan, including any new preexisting condition waiting period, to wait for an open season, or to pass a medical examination to obtain reinstatement of coverage. If an employing office terminates an employee's insurance in accordance with this section and fails to restore the employee's health insurance as required by this section upon the employee's return, the employing office may be liable for benefits lost by reason of the violation, for other actual monetary losses sustained as a direct result of the violation, and for appropriate equitable relief tailored to the harm suffered.

825.213 Employing office recovery of benefit costs.

(a) In addition to the circumstances discussed in 825.212(b), and subject to the exceptions provided in 825.208(k), an employing office may recover its share of health plan premiums during a period of unpaid FMLA leave from an employee if the employee fails to return to work after the employee's FMLA leave entitlement has been exhausted or expires, unless the reason the employee does not return is due to:

(1) The continuation, recurrence, or onset of either a serious health condition of the employee or the employee's family member, or a serious injury or illness of a covered servicemember, which would otherwise entitle the employee to leave under FMLA; or

(2) Other circumstances beyond the employee's control. Examples of other circumstances beyond the employee's control are necessarily broad. They include such situations as where a parent chooses to stay home with a newborn child who has a serious health condition; an employee's spouse is unexpectedly transferred to a job location more than 75 miles from the employee's worksite; a relative or individual other than a covered family member has a serious health condition and the employee is needed to provide care; the employee is laid off while on leave; or, the employee is a key employee who decides not to return to work upon being notified of the employing office's intention to deny restoration because of substantial and grievous economic injury to the employing office's operations and is not reinstated by the employing office. Other circumstances beyond the employee's control would not include a situation where an employee desires to remain with a parent in a distant city even though the parent no longer requires the employee's care, or a parent chooses not to return to work to stay home with a well, newborn child.

(3) When an employee fails to return to work because of the continuation, recurrence, or onset of either a serious health condition of the employee or employee's family member, or a serious injury or illness of a covered servicemember, thereby precluding the employing office from recovering its (share of) health benefit premium payments made on the employee's behalf during a period of unpaid FMLA leave, the employing office may require medical certification of the employee's or the family member's serious health condition or the covered servicemember's serious injury or illness. Such certification is not required unless requested by the employing office. The cost of the certification shall be borne by the employee, and the employee is not entitled to be paid for the time or travel costs spent in acquiring the certification. The employee is required to provide medical certification in a timely manner which, for purposes of this section, is within 30 days from the date of the employing office's request. For purposes of medical certification, the employee may use the optional forms developed for this purpose. *See* 825.306(b), 825.310(c)–(d) and Forms A, B, and F. If the employing office requests medical certification and the employee does not provide such certification in a timely manner (within 30 days), or the reason for not returning to work does not meet the test of other circumstances beyond the employee's control, the employing office may recover 100 percent of the health benefit premiums it paid during the period of unpaid FMLA leave.

(b) Under some circumstances an employing office may elect to maintain other benefits, e.g., life insurance, disability insurance,

etc., by paying the employee's (share of) premiums during periods of unpaid FMLA leave. For example, to ensure the employing office can meet its responsibilities to provide equivalent benefits to the employee upon return from unpaid FMLA leave, it may be necessary that premiums be paid continuously to avoid a lapse of coverage. If the employing office elects to maintain such benefits during the leave, at the conclusion of leave, the employing office is entitled to recover only the costs incurred for paying the employee's share of any premiums whether or not the employee returns to work.

(c) An employee who returns to work for at least 30 calendar days is considered to have returned to work. An employee who transfers directly from taking FMLA leave to retirement, or who retires during the first 30 days after the employee returns to work, is deemed to have returned to work.

(d) When an employee elects or an employing office requires paid leave to be substituted for FMLA leave, the employing office may not recover its (share of) health insurance or other non-health benefit premiums for any period of FMLA leave covered by paid leave. Because paid leave provided under a plan covering temporary disabilities (including workers' compensation) is not unpaid, recovery of health insurance premiums does not apply to such paid leave.

(e) The amount that self-insured employing offices may recover is limited to only the employing office's share of allowable premiums as would be calculated under COBRA, excluding the two percent fee for administrative costs.

(f) When an employee fails to return to work, any health and non-health benefit premiums which this section of the regulations permits an employing office to recover are a debt owed by the non-returning employee to the employing office. The existence of this debt caused by the employee's failure to return to work does not alter the employing office's responsibilities for health benefit coverage and, under a self-insurance plan, payment of claims incurred during the period of FMLA leave. To the extent recovery is allowed, the employing office may recover the costs through deduction from any sums due to the employee (e.g., unpaid wages, vacation pay, etc.), provided such deductions do not otherwise violate applicable wage payment or other laws. Alternatively, the employing office may initiate legal action against the employee to recover such costs.

825.214 Employee right to reinstatement.

General Rule. On return from FMLA leave, an employee is entitled to be returned to the same position the employee held when leave commenced, or to an equivalent position with equivalent benefits, pay, and other terms and conditions of employment. An employee is entitled to such reinstatement even if the employee has been replaced or his or her position has been restructured to accommodate the employee's absence. *See also* 825.106(e) for the obligations of employing offices that are joint employers.

825.215 Equivalent position.

(a) *Equivalent position*. An equivalent position is one that is virtually identical to the employee's former position in terms of pay, benefits and working conditions, including privileges, prerequisites and status. It must involve the same or substantially similar duties and responsibilities, which must entail substantially equivalent skill, effort, responsibility, and authority.

(b) *Conditions to qualify*. If an employee is no longer qualified for the position because of the employee's inability to attend a necessary course, renew a license, etc., as a result of the leave, the employee shall be given a reasonable opportunity to fulfill those conditions upon return to work.

(c) *Equivalent Pay*. (1) An employee is entitled to any unconditional pay increases which may have occurred during the FMLA leave period, such as cost of living increases. Pay increases conditioned upon seniority, length of service, or work performed must be granted in accordance with the employing office's policy or practice with respect to other employees on an equivalent leave status for a reason that does not qualify as FMLA leave. An employee is entitled to be restored to a position with the same or equivalent pay premiums, such as a shift differential. If an employee departed from a position averaging ten hours of overtime (and corresponding overtime pay) each week, an employee is ordinarily entitled to such a position on return from FMLA leave.

(2) Equivalent pay includes any bonus or payment, whether it is discretionary or nondiscretionary, made to employees consistent with the provisions of paragraph (c)(1) of this section. However, if a bonus or other payment is based on the achievement of a specified goal such as hours worked, products sold or perfect attendance, and the employee has not met the goal due to FMLA leave, then the payment may be denied, unless otherwise paid to employees on an equivalent leave status for a reason that does not qualify as FMLA leave. For example, if an employee who used paid vacation leave for a non-FMLA purpose would receive the payment, then the employee who used paid vacation leave for an FMLA-protected purpose also must receive the payment.

(d) *Equivalent benefits*. Benefits include all benefits provided or made available to employees by an employing office, including group life insurance, health insurance, disability insurance, sick leave, annual leave, educational benefits, and pensions, regardless of whether such benefits are provided by a practice or written policy of an employing office through an employee benefit plan.

(1) At the end of an employee's FMLA leave, benefits must be resumed in the same manner and at the same levels as provided when the leave began, and subject to any changes in benefit levels that may have taken place during the period of FMLA leave affecting the entire work force, unless otherwise elected by the employee. Upon return from FMLA leave, an employee cannot be required to requalify for any benefits the employee enjoyed before FMLA leave began (including family or dependent coverages). For example, if an employee was covered by a life insurance policy before taking leave but is not covered or coverage lapses during the period of unpaid FMLA leave, the employee cannot be required to meet any qualifications, such as taking a physical examination, in order to requalify for life insurance upon return from leave. Accordingly, some employing offices may find it necessary to modify life insurance and other benefits programs in order to restore employees to equivalent benefits upon return from FMLA leave, make arrangements for continued payment of costs to maintain such benefits during unpaid FMLA leave, or pay these costs subject to recovery from the employee on return from leave. *See* 825.213(b).

(2) An employee may, but is not entitled to, accrue any additional benefits or seniority during unpaid FMLA leave. Benefits accrued at the time leave began, however, (e.g., paid vacation, sick or personal leave to the extent not substituted for FMLA leave) must be available to an employee upon return from leave.

(3) If, while on unpaid FMLA leave, an employee desires to continue life insurance, disability insurance, or other types of benefits for which he or she typically pays, the employing office is required to follow established policies or practices for continuing such benefits for other instances of leave without pay. If the employing office has no established policy, the employee and the employing office are encouraged to agree upon arrangements before FMLA leave begins.

(4) With respect to pension and other retirement plans, any period of unpaid FMLA leave shall not be treated as or counted toward a break in service for purposes of vesting and eligibility to participate. Also, if the plan requires an employee to be employed on a specific date in order to be credited with a year of service for vesting, contributions or participation purposes, an employee on unpaid FMLA leave on that date shall be deemed to have been employed on that date. However, unpaid FMLA leave periods need not be treated as credited service for purposes of benefit accrual, vesting and eligibility to participate.

(5) Employees on unpaid FMLA leave are to be treated as if they continued to work for purposes of changes to benefit plans. They are entitled to changes in benefits plans, except those which may be dependent upon seniority or accrual during the leave period, immediately upon return from leave or to the same extent they would have qualified if no leave had been taken. For example if the benefit plan is predicated on a pre-established number of hours worked each year and the employee does not have sufficient hours as a result of taking unpaid FMLA leave, the benefit is lost. (In this regard, 825.209 addresses health benefits.)

(e) *Equivalent terms and conditions of employment*. An equivalent position must have substantially similar duties, conditions, responsibilities, privileges and status as the employee's original position.

(1) The employee must be reinstated to the same or a geographically proximate worksite (i.e., one that does not involve a significant increase in commuting time or distance) from where the employee had previously been employed. If the employee's original worksite has been closed, the employee is entitled to the same rights as if the employee had not been on leave when the worksite closed. For example, if an employing office transfers all employees from a closed worksite to a new worksite in a different city, the employee on leave is also entitled to transfer under the same conditions as if he or she had continued to be employed.

(2) The employee is ordinarily entitled to return to the same shift or the same or an equivalent work schedule.

(3) The employee must have the same or an equivalent opportunity for bonuses, and other similar discretionary and non-discretionary payments.

(4) FMLA does not prohibit an employing office from accommodating an employee's request to be restored to a different shift, schedule, or position which better suits the employee's personal needs on return from leave, or to offer a promotion to a better position. However, an employee cannot be induced by the employing office to accept a different position against the employee's wishes.

(f) *De minimis exception*. The requirement that an employee be restored to the same or equivalent job with the same or equivalent pay, benefits, and terms and conditions of employment does not extend to de minimis, intangible, or unmeasurable aspects of the job.

825.216 Limitations on an employee's right to reinstatement.

(a) An employee has no greater right to reinstatement or to other benefits and conditions of employment than if the employee had been continuously employed during the FMLA leave period. An employing office must be able to show that an employee

would not otherwise have been employed at the time reinstatement is requested in order to deny restoration to employment. For example:

(1) If an employee is laid off during the course of taking FMLA leave and employment is terminated, the employing office's responsibility to continue FMLA leave, maintain group health plan benefits and restore the employee ceases at the time the employee is laid off, provided the employing office has no continuing obligations under a collective bargaining agreement or otherwise. An employing office would have the burden of proving that an employee would have been laid off during the FMLA leave period and, therefore, would not be entitled to restoration. Restoration to a job slated for lay-off when the employee's original position is not would not meet the requirements of an equivalent position.

(2) If a shift has been eliminated, or overtime has been decreased, an employee would not be entitled to return to work that shift or the original overtime hours upon restoration. However, if a position on, for example, a night shift has been filled by another employee, the employee is entitled to return to the same shift on which employed before taking FMLA leave.

(3) If an employee was hired for a specific term or only to perform work on a discrete project, the employing office has no obligation to restore the employee if the employment term or project is over and the employing office would not otherwise have continued to employ the employee. On the other hand, if an employee was hired to perform work for one employing office for a specific time period, and after that time period has ended, the work was assigned to another employing office, the successor employing office may be required to restore the employee if it is a successor employing office.

(b) In addition to the circumstances explained above, an employing office may deny job restoration to salaried eligible employees (key employees, as defined in 825.217(c)), if such denial is necessary to prevent substantial and grievous economic injury to the operations of the employing office; or may delay restoration to an employee who fails to provide a fitness-for-duty certificate to return to work under the conditions described in 825.312.

(c) If the employee is unable to perform an essential function of the position because of a physical or mental condition, including the continuation of a serious health condition or an injury or illness also covered by workers' compensation, the employee has no right to restoration to another position under the FMLA. The employing office's obligations may, however, be governed by the Americans with Disabilities Act (ADA), as amended and as made applicable by the CAA. *See* 825.702.

(d) An employee who fraudulently obtains FMLA leave from an employing office is not protected by the job restoration or maintenance of health benefits provisions of the FMLA, as made applicable by the CAA.

(e) If the employing office has a uniformly-applied policy governing outside or supplemental employment, such a policy may continue to apply to an employee while on FMLA leave. An employing office which does not have such a policy may not deny benefits to which an employee is entitled under FMLA, as made applicable by the CAA, on this basis unless the FMLA leave was fraudulently obtained as in paragraph (d) of this section.

825.217 Key employee, general rule.

(a) A key employee is a salaried FMLA-eligible employee who is among the highest paid 10 percent of all the employees employed by the employing office within 75 miles of the employee's worksite.

(b) The term salaried means paid on a salary basis, within the meaning of the Board's FLSA regulations at part 541, implementing section 203 of the CAA (2 U.S.C. 1313), regarding employees who may qualify as exempt from the minimum wage and overtime requirements of the FLSA, as made applicable by the CAA.

(c) A key employee must be among the highest paid 10 percent of all the employees—both salaried and non-salaried, eligible and ineligible—who are employed by the employing office within 75 miles of the worksite.

(1) In determining which employees are among the highest paid 10 percent, year-to-date earnings are divided by weeks worked by the employee (including weeks in which paid leave was taken). Earnings include wages, premium pay, incentive pay, and nondiscretionary and discretionary bonuses. Earnings do not include incentives whose value is determined at some future date, e.g., benefits or prerequisites.

(2) The determination of whether a salaried employee is among the highest paid 10 percent shall be made at the time the employee gives notice of the need for leave. No more than 10 percent of the employing office's employees within 75 miles of the worksite may be key employees.

825.218 Substantial and grievous economic injury.

(a) In order to deny restoration to a key employee, an employing office must determine that the restoration of the employee to employment will cause substantial and grievous economic injury to the operations of the employing office, not whether the absence of the employee will cause such substantial and grievous injury.

(b) An employing office may take into account its ability to replace on a temporary basis (or temporarily do without) the employee on FMLA leave. If permanent replacement is unavoidable, the cost of then reinstating the employee can be considered in evaluating whether substantial and grievous economic injury will occur from restoration; in other words, the effect on the operations of the employing office of reinstating the employee in an equivalent position.

(c) A precise test cannot be set for the level of hardship or injury to the employing office which must be sustained. If the reinstatement of a key employee threatens the economic viability of the employing office, that would constitute substantial and grievous economic injury. A lesser injury which causes substantial, long-term economic injury would also be sufficient. Minor inconveniences and costs that the employing office would experience in the normal course would certainly not constitute substantial and grievous economic injury.

(d) FMLA's substantial and grievous economic injury standard is different from and more stringent than the undue hardship test under the ADA, as made applicable by the CAA. *See also* 825.702.

825.219 Rights of a key employee.

(a) An employing office that believes that reinstatement may be denied to a key employee, must give written notice to the employee at the time the employee gives notice of the need for FMLA leave (or when FMLA leave commences, if earlier) that he or she qualifies as a key employee. At the same time, the employing office must also fully inform the employee of the potential consequences with respect to reinstatement and maintenance of health benefits if the employing office should determine that substantial and grievous economic injury to the employing office's operations will result if the employee is reinstated from FMLA leave. If such notice cannot be given immediately because of the need to determine whether the employee is a key employee, it shall be given as soon as practicable after being notified of a need for leave (or the commencement of leave, if earlier). It is expected that in most circumstances there will be no desire that an employee be denied restoration after FMLA leave and, therefore, there would be no need to provide such notice. However, an employing office who fails to provide such timely notice will lose its right to deny restoration even if substantial and grievous economic injury will result from reinstatement.

(b) As soon as an employing office makes a good faith determination, based on the facts available, that substantial and grievous economic injury to its operations will result if a key employee who has given notice of the need for FMLA leave or is using FMLA leave is reinstated, the employing office shall notify the employee in writing of its determination, that it cannot deny FMLA leave, and that it intends to deny restoration to employment on completion of the FMLA leave. It is anticipated that an employing office will ordinarily be able to give such notice prior to the employee starting leave. The employing office must serve this notice either in person or by certified mail. This notice must explain the basis for the employing office's finding that substantial and grievous economic injury will result, and, if leave has commenced, must provide the employee a reasonable time in which to return to work, taking into account the circumstances, such as the length of the leave and the urgency of the need for the employee to return.

(c) If an employee on leave does not return to work in response to the employing office's notification of intent to deny restoration, the employee continues to be entitled to maintenance of health benefits and the employing office may not recover its cost of health benefit premiums. A key employee's rights under FMLA continue unless and until the employee either gives notice that he or she no longer wishes to return to work, or the employing office actually denies reinstatement at the conclusion of the leave period.

(d) After notice to an employee has been given that substantial and grievous economic injury will result if the employee is reinstated to employment, an employee is still entitled to request reinstatement at the end of the leave period even if the employee did not return to work in response to the employing office's notice. The employing office must then again determine whether there will be substantial and grievous economic injury from reinstatement, based on the facts at that time. If it is determined that substantial and grievous economic injury will result, the employing office shall notify the employee in writing (in person or by certified mail) of the denial of restoration.

825.220 Protection for employees who request leave or otherwise assert FMLA rights.

(a) The FMLA, as made applicable by the CAA, prohibits interference with an employee's rights under the law, and with legal proceedings or inquiries relating to an employee's rights. More specifically, the law contains the following employee protections:

(1) An employing office is prohibited from interfering with, restraining, or denying the exercise of (or attempts to exercise) any rights provided by the FMLA, as made applicable by the CAA.

(2) An employing office is prohibited from discharging or in any other way discriminating against any covered employee (whether or not an eligible employee) for opposing or complaining about any unlawful practice under the FMLA, as made applicable by the CAA.

(3) All employing offices are prohibited from discharging or in any other way discriminating against any covered employee (whether or not an eligible employee) because that covered employee has—

(i) Filed any claim, or has instituted (or caused to be instituted) any proceeding under or related to the FMLA, as made applicable by the CAA;

(ii) Given, or is about to give, any information in connection with an inquiry or proceeding relating to a right under the FMLA, as made applicable by the CAA;

(iii) Testified, or is about to testify, in any inquiry or proceeding relating to a right under the FMLA, as made applicable by the CAA.

(b) Any violations of the FMLA, as made applicable by the CAA, or of these regulations constitute interfering with, restraining, or denying the exercise of rights provided by the FMLA, as made applicable by the CAA. An employing office may be liable for compensation and benefits lost by reason of the violation, for other actual monetary losses sustained as a direct result of the violation, and for appropriate equitable or other relief, including employment, reinstatement, promotion, or any other relief tailored to the harm suffered. *See* 825.400(b). Interfering with the exercise of an employee's rights would include, for example, not only refusing to authorize FMLA leave, but discouraging an employee from using such leave. It would also include manipulation by a covered employing office to avoid responsibilities under FMLA, for example:

(1) [Reserved]

(2) Changing the essential functions of the job in order to preclude the taking of leave; or

(3) Reducing hours available to work in order to avoid employee eligibility.

(c) The FMLA's prohibition against interference prohibits an employing office from discriminating or retaliating against an employee or prospective employee for having exercised or attempted to exercise FMLA rights. For example, if an employee on leave without pay would otherwise be entitled to full benefits (other than health benefits), the same benefits would be required to be provided to an employee on unpaid FMLA leave. By the same token, employing offices cannot use the taking of FMLA leave as a negative factor in employment actions, such as hiring, promotions or disciplinary actions; nor can FMLA leave be counted under no fault attendance policies. *See* 825.215.

(d) Employees cannot waive, nor may employing offices induce employees to waive, their rights under FMLA. For example, employees (or their collective bargaining representatives) cannot trade off the right to take FMLA leave against some other benefit offered by the employing office. Except for settlement agreements covered by 1414 and/or 1415 of the Congressional Accountability Act, this does not prevent the settlement or release of FMLA claims by employees based on past employing office conduct without the approval of the Office of Congressional Workplace Rights or a court. Nor does it prevent an employee's voluntary and uncoerced acceptance (not as a condition of employment) of a light duty assignment while recovering from a serious health condition. *See* 825.702(d). An employee's acceptance of such light duty assignment does not constitute a waiver of the employee's prospective rights, including the right to be restored to the same position the employee held at the time the employee's FMLA leave commenced or to an equivalent position. The employee's right to restoration, however, ceases at the end of the applicable 12-month FMLA leave year.

(e) Covered employees, and not merely eligible employees, are protected from retaliation for opposing (e.g., filing a complaint about) any practice which is unlawful under the FMLA, as made applicable by the CAA. They are similarly protected if they oppose any practice which they reasonably believe to be a violation of the FMLA, as made applicable by the CAA, or regulations.

SUBPART C—EMPLOYEE AND EMPLOYING OFFICE RIGHTS AND OBLIGATIONS UNDER THE FMLA, AS MADE APPLICABLE BY THE CAA

825.300 Employing office notice requirements.

(a)(1) If an employing office has any eligible employees and has any written guidance to employees concerning employee benefits or leave rights, such as in an employee handbook, information concerning both entitlements and employee obligations under the FMLA, as made applicable by the CAA, must be included in the handbook or other document. For example, if an employing office provides an employee handbook to all employees that describes the employing office's policies regarding leave, wages, attendance, and similar matters, the handbook must incorporate information on FMLA rights and responsibilities and the employing office's policies regarding the FMLA, as made applicable by the CAA. Informational publications describing the provisions of the FMLA, as made applicable by the CAA, are available from the Office of Congressional Workplace Rights and may be incorporated in such employing office handbooks or written policies.

(2) If such an employing office does not have written policies, manuals, or handbooks describing employee benefits and leave provisions, the employing office shall provide written guidance to an employee concerning all the employee's rights and obligations under the FMLA, as made applicable by the CAA. This notice shall be provided to employees each time notice is given pursuant to paragraph (c), and in accordance with the provisions of that paragraph. Employing offices may duplicate and provide the employee a copy of the FMLA Fact Sheet available from the Office of Congressional Workplace Rights to provide such guidance.

(b) *Eligibility notice.* (1) When an employee requests FMLA leave, or when the employing office acquires knowledge that an employee's leave may be for an FMLA-qualifying reason, the employing office must notify the employee of the employee's eligibility to take FMLA leave within five business days, absent extenuating circumstances. *See* 825.110 for definition of an eligible employee. Employee eligibility is determined (and notice must be provided) at the commencement of the first instance of leave for each FMLA-qualifying reason in the applicable 12-month period. *See* 825.127(c) and 825.200(b). All FMLA absences for the same qualifying reason are considered a single leave and employee eligibility as to that reason for leave does not change during the applicable 12-month period.

(2) The eligibility notice must state whether the employee is eligible for FMLA leave as defined in 825.110. If the employee is not eligible for FMLA leave, the notice must state at least one reason why the employee is not eligible, including as applicable the number of months the employee has been employed by the employing office and the hours of service with the employing office during the 12-month period. Notification of eligibility may be oral or in writing; employing offices may use Form C to provide such notification to employees.

(3) If, at the time an employee provides notice of a subsequent need for FMLA leave during the applicable 12-month period due to a different FMLA-qualifying reason, and the employee's eligibility status has not changed, no additional eligibility notice is required. If, however, the employee's eligibility status has changed (e.g., if the employee has not met the hours of service requirement in the 12 months preceding the commencement of leave for the subsequent qualifying reason), the employing office must notify the employee of the change in eligibility status within five business days, absent extenuating circumstances.

(c) *Rights and responsibilities notice.* (1) Employing offices shall provide written notice detailing the specific expectations and obligations of the employee and explaining any consequences of a failure to meet these obligations. This notice shall be provided to the employee each time the eligibility notice is provided pursuant to paragraph (b) of this section. If leave has already begun, the notice should be mailed to the employee's address of record. Such specific notice must include, as appropriate:

(i) That the leave may be designated and counted against the employee's annual FMLA leave entitlement if qualifying (*See* 825.300(c) and 825.301) and the applicable 12-month period for FMLA entitlement (*See* 825.127(c), 825.200(b), (f), and (g));

(ii) Any requirements for the employee to furnish certification of a serious health condition, serious injury or illness, or qualifying exigency arising out of covered active duty or call to covered active duty status, and the consequences of failing to do so (*See* 825.305, 825.309, 825.310, 825.313);

(iii) If applicable, the employee's right to substitute paid parental leave for unpaid FMLA leave for a birth or placement (*See* 825.208) and the employee's right to substitute paid leave generally, whether the employing office will require the substitution of paid leave, the conditions related to any substitution, and the employee's entitlement to take unpaid FMLA leave if the employee does not meet the conditions for paid leave (*See* 825.207);

(iv) Any requirement for the employee to make any premium payments to maintain health benefits and the arrangements for making such payments (*See* 825.210), and the possible consequences of failure to make such payments on a timely basis (i.e., the circumstances under which coverage may lapse);

(v) The employee's status as a key employee and the potential consequence that restoration may be denied following FMLA leave, explaining the conditions required for such denial (*See* 825.218);

(vi) The employee's right to maintenance of benefits during the FMLA leave and restoration to the same or an equivalent job upon return from FMLA leave (*See* 825.214 and 825.604); and

(vii) The employee's potential liability for payment of health insurance premiums paid by the employing office during the employee's unpaid FMLA leave if the employee fails to return to work after taking FMLA leave (*See* 825.213, 825.208(k)).

(2) The notice of rights and responsibilities may include other information—e.g., whether the employing office will require periodic reports of the employee's status and intent to return to work—but is not required to do so.

(3) The notice of rights and responsibilities may be accompanied by any required certification form.

(4) If the specific information provided by the notice of rights and responsibilities changes, the employing office shall, within five business days of receipt of the employee's first notice of need for leave subsequent to any change, provide written notice referencing the prior notice and setting forth any of the information in the notice of rights and responsibilities that has changed. For

example, if the initial leave period was paid leave and the subsequent leave period would be unpaid leave, the employing office may need to give notice of the arrangements for making premium payments.

(5) Employing offices are also expected to responsively answer questions from employees concerning their rights and responsibilities under the FMLA, as made applicable under the CAA.

(6) A prototype notice of rights and responsibilities may be obtained in Form C, or from the Office of Congressional Workplace Rights. Employing offices may adapt the prototype notice as appropriate to meet these notice requirements. The notice of rights and responsibilities may be distributed electronically so long as it otherwise meets the requirements of this section.

(d) *Designation notice.* (1) The employing office is responsible in all circumstances for designating leave as FMLA-qualifying, and for giving notice of the designation to the employee as provided in this section. When the employing office has enough information to determine whether the leave is being taken for a FMLA-qualifying reason (e.g., after receiving a certification), the employing office must notify the employee whether the leave will be designated and will be counted as FMLA leave within five business days absent extenuating circumstances. Only one notice of designation is required for each FMLA-qualifying reason per applicable 12-month period, regardless of whether the leave taken due to the qualifying reason will be a continuous block of leave or intermittent or reduced schedule leave. If the employing office determines that the leave will not be designated as FMLA-qualifying (e.g., if the leave is not for a reason covered by FMLA or the FMLA leave entitlement has been exhausted), the employing office must notify the employee of that determination. Subject to 825.208, if the employing office requires paid leave to be substituted for unpaid FMLA leave, or that paid leave taken under an existing leave plan be counted as FMLA leave, the employing office must inform the employee of this designation at the time of designating the FMLA leave.

(2) If the employing office has sufficient information to designate the leave as FMLA leave immediately after receiving notice of the employee's need for leave, the employing office may provide the employee with the designation notice at that time.

(3) If the employing office will require the employee to present a fitness-for-duty certification to be restored to employment, the employing office must provide notice of such requirement with the designation notice. If the employing office will require that the fitness-for-duty certification address the employee's ability to perform the essential functions of the employee's position, the employing office must so indicate in the designation notice, and must include a list of the essential functions of the employee's position. *See* 825.312. If the employing office's handbook or other written documents (if any) describing the employing office's leave policies clearly provide that a fitness-for-duty certification will be required in specific circumstances (e.g., by stating that fitness-for-duty certification will be required in all cases of back injuries for employees in a certain occupation), the employing office is not required to provide written notice of the requirement with the designation notice, but must provide oral notice no later than with the designation notice.

(4) The designation notice must be in writing. A prototype designation notice is contained in Form D which may be obtained from the Office of Congressional Workplace Rights. If the leave is not designated as FMLA leave because it does not meet the requirements of the FMLA, as made applicable by the CAA, the notice to the employee that the leave is not designated as FMLA leave may be in the form of a simple written statement. The designation notice may be distributed electronically so long as it otherwise meets the requirements of this section and the employing office can demonstrate that the employee (who may already be on leave and who may not have access to employing office-provided computers) has access to the information electronically.

(5) If the information provided by the employing office to the employee in the designation notice changes (e.g., the employee exhausts the FMLA leave entitlement), the employing office shall provide, within five business days of receipt of the employee's first notice of need for leave subsequent to any change, written notice of the change.

(6) The employing office must notify the employee of the amount of leave counted against the employee's FMLA leave entitlement and, if applicable, the employee's paid parental leave entitlement. If the amount of leave needed is known at the time the employing office designates the leave as FMLA-qualifying, the employing office must notify the employee of the number of hours, days, or weeks that will be counted against the employee's FMLA leave entitlement in the designation notice. If it is not possible to provide the hours, days, or weeks that will be counted against the employee's FMLA leave entitlement (such as in the case of unforeseeable intermittent leave), then the employing office must provide notice of the amount of leave counted against the employee's FMLA leave entitlement and, if applicable, paid parental leave entitlement, upon the request by the employee, but no more often than once in a 30-day period and only if leave was taken in that period. The notice of the amount of leave counted against the employee's FMLA entitlement and, if applicable, paid parental leave entitlement may be oral or in writing. If such notice is oral, it shall be confirmed in writing no later than the following payday (unless the payday is less than one week after the oral notice, in which case the notice must be no later than the subsequent payday). Such written notice may be in any form, including a notation on the employee's pay stub.

(e) *Consequences of failing to provide notice.* Failure to follow the notice requirements set forth in this section may constitute an interference with, restraint, or denial of the exercise of an employee's FMLA rights. An employing office may be liable for compensation and benefits lost by reason of the violation, for other actual monetary losses sustained as a direct result of the violation, and for appropriate equitable or other relief, including employment, reinstatement, promotion, or any other relief tailored to the harm suffered. *See* 825.400(b).

825.301 Designation of FMLA leave.

(a) *Employing office responsibilities.* The employing office's decision to designate leave as FMLA-qualifying must be based only on information received from the employee or the employee's spokesperson (e.g., if the employee is incapacitated, the employee's spouse, adult child, parent, doctor, etc., may provide notice to the employing office of the need to take FMLA leave). In any circumstance where the employing office does not have sufficient information about the reason for an employee's use of leave, the employing office should inquire further of the employee or the spokesperson to ascertain whether leave is potentially FMLA-qualifying. Once the employing office has acquired knowledge that the leave is being taken for a FMLA-qualifying reason, the employing office must notify the employee as provided in 825.300(d).

(b) *Employee responsibilities.* An employee giving notice of the need for FMLA leave does not need to expressly assert rights under the FMLA, as made applicable by the CAA, or even mention the FMLA to meet his or her obligation to provide notice, though the employee would need to state a qualifying reason for the needed leave and otherwise satisfy the notice requirements set forth in 825.302 or 825.303 depending on whether the need for leave is foreseeable or unforeseeable. An employee giving notice of the need for FMLA leave must explain the reasons for the needed leave so as to allow the employing office to determine whether the leave qualifies under the FMLA, as made applicable by the CAA. If the employee fails to explain the reasons, leave may be denied. In many cases, in explaining the reasons for a request to use leave, especially when the need for the leave was unexpected or unforeseen, an employee will provide sufficient information for the employing office to designate the leave as FMLA leave. An employee using accrued paid leave may in some cases not spontaneously explain the reasons or their plans for using their accrued leave. However, if an employee requesting to use paid leave for a FMLA-qualifying reason does not explain the reason for the leave and the employing office denies the employee's request, the employee will need to provide sufficient information to establish a FMLA-qualifying reason for the needed leave so that the employing office is aware that the leave may not be denied and may designate that the paid leave be appropriately counted against (substituted for) the employee's FMLA leave entitlement. Similarly, an employee using accrued paid vacation leave who *seeks* an extension of unpaid leave for a FMLA-qualifying reason will need to state the reason. If this is due to an event which occurred during the period of paid leave, the employing office may count the leave used after the FMLA-qualifying reason against the employee's FMLA leave entitlement.

(c) *Disputes.* If there is a dispute between an employing office and an employee as to whether leave qualifies as FMLA leave, it should be resolved through discussions between the employee and the employing office. Such discussions and the decision must be documented.

(d) *Retroactive designation.* Subject to 825.208, if an employing office does not designate leave as required by 825.300, the employing office may retroactively designate leave as FMLA leave with appropriate notice to the employee as required by 825.300 provided that the employing office's failure to timely designate leave does not cause harm or injury to the employee. In all cases where leave would qualify for FMLA protections, an employing office and an employee can mutually agree that leave be retroactively designated as FMLA leave.

(e) *Remedies.* If an employing office's failure to timely designate leave in accordance with 825.300 causes the employee to suffer harm, it may constitute an interference with, restraint of, or denial of the exercise of an employee's FMLA rights. An employing office may be liable for compensation and benefits lost by reason of the violation, for other actual monetary losses sustained as a direct result of the violation, and for appropriate equitable or other relief, including employment, reinstatement, promotion, or any other relief tailored to the harm suffered. *See* 825.400(b). For example, if an employing office that was put on notice that an employee needed FMLA leave failed to designate the leave properly, but the employee's own serious health condition prevented him or her from returning to work during that time period regardless of the designation, an employee may not be able to show that the

employee suffered harm as a result of the employing office's actions. However, if an employee took leave to provide care for a son or daughter with a serious health condition believing it would not count toward his or her FMLA entitlement, and the employee planned to later use that FMLA leave to provide care for a spouse who would need assistance when recovering from surgery planned for a later date, the employee may be able to show that harm has occurred as a result of the employing office's failure to designate properly. The employee might establish this by showing that he or she would have arranged for an alternative caregiver for the seriously-ill son or daughter if the leave had been designated timely.

825.302 Employee notice requirements for foreseeable FMLA leave.

(a) *Timing of notice.* An employee must provide the employing office at least 30 days advance notice before FMLA leave is to begin if the need for the leave is foreseeable based on an expected birth, placement for adoption or foster care, planned medical treatment for a serious health condition of the employee or of a family member, or the planned medical treatment for a serious injury or illness of a covered servicemember. If 30 days' notice is not practicable, such as because of a lack of knowledge of approximately when leave will be required to begin, a change in circumstances, or a medical emergency, notice must be given as soon as practicable. For example, an employee's health condition may require leave to commence earlier than anticipated before the birth of a child. Similarly, little opportunity for notice may be given before placement for adoption. For foreseeable leave due to a qualifying exigency, notice must be provided as soon as practicable, regardless of how far in advance such leave is foreseeable. Whether FMLA leave is to be continuous or is to be taken intermittently or on a reduced schedule basis, notice need only be given one time, but the employee shall advise the employing office as soon as practicable if dates of scheduled leave change or are extended, or were initially unknown. In those cases where the employee is required to provide at least 30 days' notice of foreseeable leave and does not do so, the employee shall explain the reasons why such notice was not practicable upon a request from the employing office for such information.

(b) As soon as practicable means as soon as both possible and practical, taking into account all of the facts and circumstances in the individual case. When an employee becomes aware of a need for FMLA leave less than 30 days in advance, it should be practicable for the employee to provide notice of the need for leave either the same day or the next business day. In all cases, however, the determination of when an employee could practicably provide notice must take into account the individual facts and circumstances.

(c) *Content of notice.* An employee shall provide at least verbal notice sufficient to make the employing office aware that the employee needs FMLA-qualifying leave, and the anticipated timing and duration of the leave. Depending on the situation, such information may include that a condition renders the employee unable to perform the functions of the job; that the employee is pregnant or has been hospitalized overnight; whether the employee or the employee's family member is under the continuing care of a health care provider; if the leave is due to a qualifying exigency, that a military member is on covered active duty or call to covered active duty status (or has been notified of an impending call or order to covered active duty), and that the requested leave is for one of the reasons listed in 825.126(b); if the leave is for a family member, that the condition renders the family member unable to perform daily activities, or that the family member is a covered servicemember with a serious injury or illness; and the anticipated duration of the absence, if known. When an employee seeks leave for the first time for a FMLA-qualifying reason, the employee need not expressly assert rights under the FMLA, as made applicable by the CAA, or even mention the FMLA. When an employee seeks leave due to a FMLA-qualifying reason, for which the employing office has previously provided FMLA-protected leave, the employee must specifically reference the qualifying reason for leave or the need for FMLA leave. In all cases, the employing office should inquire further of the employee if it is necessary to have more information about whether FMLA leave is being sought by the employee, and obtain the necessary details of the leave to be taken. In the case of medical conditions, the employing office may find it necessary to inquire further to determine if the leave is because of a serious health condition and may request medical certification to support the need for such leave. *See* 825.305. An employing office may also request certification to support the need for leave for a qualifying exigency or for military caregiver leave. *See* 825.309, 825.310. When an employee has been previously certified for leave due to more than one FMLA-qualifying reason, the employing office may need to inquire further to determine for which qualifying reason the leave is needed. An employee has an obligation to respond to an employing office's questions designed to determine whether an absence is potentially FMLA-qualifying. Failure to respond to reasonable employing office inquiries regarding the leave request may result in denial of FMLA protection if the employing office is unable to determine whether the leave is FMLA-qualifying.

(d) Complying with the employing office policy. An employing office may require an employee to comply with the employing office's usual and customary notice and procedural requirements for requesting leave, absent unusual circumstances. For example, an employing office may require that written notice set forth the reasons for the requested leave, the anticipated duration of the leave, and the anticipated start of the leave. An employee also may be required by an employing office's policy to contact a specific individual. Unusual circumstances would include situations such as when an employee is unable to comply with the employing office's policy that requests for leave should be made by contacting a specific number because on the day the employee needs to provide notice of his or her need for FMLA leave there is no one to answer the call-in number and the voice mail box is full. Where an employee does not comply with the employing office's usual notice and procedural requirements, and no unusual circumstances justify the failure to comply, FMLA-protected leave may be delayed or denied. However, FMLA-protected leave may not be delayed or denied where the employing office's policy requires notice to be given sooner than set forth in paragraph (a) of this section and the employee provides timely notice as set forth in paragraph (a) of this section.

(e) *Scheduling planned medical treatment.* When planning medical treatment, the employee must consult with the employing office and make a reasonable effort to schedule the treatment so as not to disrupt unduly the employing office's operations, subject to the approval of the health care provider. Employees are ordinarily expected to consult with their employing offices prior to the scheduling of treatment in order to work out a treatment schedule which best suits the needs of both the employing office and the employee. For example, if an employee who provides notice of the need to take FMLA leave on an intermittent basis for planned medical treatment neglects to consult with the employing office to make a reasonable effort to arrange the schedule of treatments so as not to unduly disrupt the employing office's operations, the employing office may initiate discussions with the employee and require the employee to attempt to make such arrangements, subject to the approval of the health care provider. *See* 825.203 and 825.205.

(f) Intermittent leave or leave on a reduced leave schedule must be medically necessary due to a serious health condition or a serious injury or illness. An employee shall advise the employing office, upon request, of the reasons why the intermittent/reduced leave schedule is necessary and of the schedule for treatment, if applicable. The employee and employing office shall attempt to work out a schedule for such leave that meets the employee's needs without unduly disrupting the employing office's operations, subject to the approval of the health care provider.

(g) An employing office may waive employees' FMLA notice requirements. *See* 825.304(e).

825.303 Employee notice requirements for unforeseeable FMLA leave.

(a) *Timing of notice.* When the approximate timing of the need for leave is not foreseeable, an employee must provide notice to the employing office as soon as practicable under the facts and circumstances of the particular case. It generally should be practicable for the employee to provide notice of leave that is unforeseeable within the time prescribed by the employing office's usual and customary notice requirements applicable to such leave. *See* 825.303(c). Notice may be given by the employee's spokesperson (e.g., spouse, adult family member, or other responsible party) if the employee is unable to do so personally. For example, if an employee's child has a severe asthma attack and the employee takes the child to the emergency room, the employee would not be required to leave his or her child in order to report the absence while the child is receiving emergency treatment. However, if the child's asthma attack required only the use of an inhaler at home followed by a period of rest, the employee would be expected to call the employing office promptly after ensuring the child has used the inhaler.

(b) *Content of notice.* An employee shall provide sufficient information for an employing office to reasonably determine whether the FMLA may apply to the leave request. Depending on the situation, such information may include that a condition renders the employee unable to perform the functions of the job; that the employee is pregnant or has been hospitalized overnight; whether the employee or the employee's family member is under the continuing care of a health care provider; if the leave is due to a qualifying exigency, that a military member is on covered active duty or call to covered active duty status (or has been notified of an impending call or order to covered active duty), that the requested leave is for one of the reasons listed in 825.126(b), and the anticipated duration of the absence; or if the leave is for a family member that the condition renders the family member unable to perform daily activities or that the family member is a covered servicemember with a serious injury or illness; and the anticipated duration of the absence, if known. When an employee seeks leave for the first time for a FMLA-qualifying reason, the employee need not expressly assert rights under the FMLA,

as made applicable by the CAA, or even mention the FMLA. When an employee seeks leave due to a qualifying reason, for which the employing office has previously provided the employee FMLA-protected leave, the employee must specifically reference either the qualifying reason for leave or the need for FMLA leave. Calling in ''sick'' without providing more information will not be considered sufficient notice to trigger an employing office's obligations under the FMLA, as made applicable by the CAA. The employing office will be expected to obtain any additional required information through informal means. An employee has an obligation to respond to an employing office's questions designed to determine whether an absence is potentially FMLA-qualifying. Failure to respond to reasonable employing office inquiries office regarding the leave request may result in denial of FMLA protection if the employing office is unable to determine whether the leave is FMLA-qualifying.

(c) *Complying with employing office policy*. When the need for leave is not foreseeable, an employee must comply with the employing office's usual and customary notice and procedural requirements for requesting leave, absent unusual circumstances. For example, an employing office may require employees to call a designated number or a specific individual to request leave. However, if an employee requires emergency medical treatment, he or she would not be required to follow the call-in procedure until his or her condition is stabilized and he or she has access to, and is able to use, a phone. Similarly, in the case of an emergency requiring leave because of a FMLA-qualifying reason, written advance notice pursuant to an employing office's internal rules and procedures may not be required when FMLA leave is involved. If an employee does not comply with the employing office's usual notice and procedural requirements, and no unusual circumstances justify the failure to comply, FMLA-protected leave may be delayed or denied.

825.304 Employee failure to provide notice.

(a) *Proper notice required*. In all cases, in order for the onset of an employee's FMLA leave to be delayed due to lack of required notice, it must be clear that the employee had actual notice of the FMLA notice requirements. This condition would be satisfied by the employing office's proper posting, at the worksite where the employee is employed, of the information regarding the FMLA provided (pursuant to section 301(h)(2) of the CAA, 2 U.S.C. 1381(h)(2)) by the Office of Congressional Workplace Rights to the employing office in a manner suitable for posting.

(b) *Foreseeable leave—30 days*. When the need for FMLA leave is foreseeable at least 30 days in advance and an employee fails to give timely advance notice with no reasonable excuse, the employing office may delay FMLA coverage until 30 days after the date the employee provides notice. The need for leave and the approximate date leave would be taken must have been clearly foreseeable to the employee 30 days in advance of the leave. For example, knowledge that an employee would receive a telephone call about the availability of a child for adoption at some unknown point in the future would not be sufficient to establish the leave was clearly foreseeable 30 days in advance.

(c) *Foreseeable leave—less than 30 days*. When the need for FMLA leave is foreseeable fewer than 30 days in advance and an employee fails to give notice as soon as practicable under the particular facts and circumstances, the extent to which an employing office may delay FMLA coverage for leave depends on the facts of the particular case. For example, if an employee reasonably should have given the employing office two weeks' notice but instead only provided one week's notice, then the employing office may delay FMLA-protected leave for one week (thus, if the employing office elects to delay FMLA coverage and the employee nonetheless takes leave one week after providing the notice (i.e., a week before the two week notice period has been met) the leave will not be FMLA-protected).

(d) *Unforeseeable leave*. When the need for FMLA leave is unforeseeable and an employee fails to give notice in accordance with 825.303, the extent to which an employing office may delay FMLA coverage for leave depends on the facts of the particular case. For example, if it would have been practicable for an employee to have given the employing office notice of the need for leave very soon after the need arises consistent with the employing office's policy, but instead the employee provided notice two days after the leave began, then the employing office may delay FMLA coverage of the leave by two days.

(e) *Waiver of notice*. An employing office may waive employees' FMLA notice obligations or the employing office's own internal rules on leave notice requirements. If an employing office does not waive the employee's obligations under its internal leave rules, the employing office may take appropriate action under its internal rules and procedures for failure to follow its usual and customary notification rules, absent unusual circumstances, as long as the actions are taken in a manner that does not discriminate against employees taking FMLA leave and the rules are not inconsistent with 825.303(a).

825.305 Certification, general rule.

(a) *General*. An employing office may require that an employee's leave to care for the employee's covered family member with a serious health condition, or due to the employee's own serious health condition that makes the employee unable to perform one or more of the essential functions of the employee's position, be supported by a certification issued by the health care provider of the employee or the employee's family member. An employing office may also require that an employee's leave because of a qualifying exigency or to care for a covered servicemember with a serious injury or illness be supported by a certification, as described in 825.309 and 825.310, respectively. An employing office must give notice of a requirement for certification each time a certification is required; such notice must be written notice whenever required by 825.300(c). An employing office's oral request to an employee to furnish any subsequent certification is sufficient.

(b) *Timing*. In most cases, the employing office should request that an employee furnish certification at the time the employee gives notice of the need for leave or within five business days thereafter, or, in the case of unforeseen leave, within five business days after the leave commences. The employing office may request certification at some later date if the employing office later has reason to question the appropriateness of the leave or its duration. The employee must provide the requested certification to the employing office within 15 calendar days after the employing office's request, unless it is not practicable under the particular circumstances to do so despite the employee's diligent, good faith efforts or the employing office provides more than 15 calendar days to return the requested certification.

(c) *Complete and sufficient certification*. The employee must provide a complete and sufficient certification to the employing office if required by the employing office in accordance with 825.306, 825.309, and 825.310. The employing office shall advise an employee whenever the employing office finds a certification incomplete or insufficient, and shall state in writing what additional information is necessary to make the certification complete and sufficient. A certification is considered incomplete if the employing office receives a certification, but one or more of the applicable entries have not been completed. A certification is considered insufficient if the employing office receives a complete certification, but the information provided is vague, ambiguous, or non-responsive. The employing office must provide the employee with seven calendar days (unless not practicable under the particular circumstances despite the employee's diligent good faith efforts) to cure any such deficiency. If the deficiencies specified by the employing office are not cured in the resubmitted certification, the employing office may deny the taking of FMLA leave, in accordance with 825.313. A certification that is not returned to the employing office is not considered incomplete or insufficient, but constitutes a failure to provide certification.

(d) *Consequences*. At the time the employing office requests certification, the employing office must also advise an employee of the anticipated consequences of an employee's failure to provide adequate certification. If the employee fails to provide the employing office with a complete and sufficient certification, despite the opportunity to cure the certification as provided in paragraph (c) of this section, or fails to provide any certification, the employing office may deny the taking of FMLA leave, in accordance with 825.313. It is the employee's responsibility either to furnish a complete and sufficient certification or to furnish the health care provider providing the certification with any necessary authorization from the employee or the employee's family member in order for the health care provider to release a complete and sufficient certification to the employing office to support the employee's FMLA request. This provision will apply in any case where an employing office requests a certification permitted by these regulations, whether it is the initial certification, a recertification, a second or third opinion, or a fitness-for-duty certificate, including any clarifications necessary to determine if such certifications are authentic and sufficient. *See* 825.306, 825.307, 825.308, and 825.312.

(e) *Annual medical certification*. Where the employee's need for leave due to the employee's own serious health condition, or the serious health condition of the employee's covered family member, lasts beyond a single leave year (as defined in 825.200), the employing office may require the employee to provide a new medical certification in each subsequent leave year. Such new medical certifications are subject to the provisions for authentication and clarification set forth in 825.307, including second and third opinions.

825.306 Content of medical certification for leave taken because of an employee's own serious health condition or the serious health condition of a family member.

(a) *Required information*. When leave is taken because of an employee's own serious health condition, or the serious health condition of a family member, an employing office may require an employee to obtain a medical certification from a health care provider that sets forth the following information:

(1) The name, address, telephone number, and fax number of the health care provider and type of medical practice/specialization;

(2) The approximate date on which the serious health condition commenced, and its probable duration;

(3) A statement or description of appropriate medical facts regarding the patient's health condition for which FMLA leave is requested. The medical facts must be sufficient to support the need for leave. Such medical facts may include information on symptoms, diagnosis, hospitalization, doctor visits, whether medication has been prescribed, any referrals for evaluation or treatment (physical therapy, for example), or any other regimen of continuing treatment;

(4) If the employee is the patient, information sufficient to establish that the employee cannot perform the essential functions of the employee's job as well as the nature of any other work restrictions, and the likely duration of such inability (*See* 825.123(b));

(5) If the patient is a covered family member with a serious health condition, information sufficient to establish that the family member is in need of care, as described in 825.124, and an estimate of the frequency and duration of the leave required to care for the family member;

(6) If an employee requests leave on an intermittent or reduced schedule basis for planned medical treatment of the employee's or a covered family member's serious health condition, information sufficient to establish the medical necessity for such intermittent or reduced schedule leave and an estimate of the dates and duration of such treatments and any periods of recovery;

(7) If an employee requests leave on an intermittent or reduced schedule basis for the employee's serious health condition, including pregnancy, that may result in unforeseeable episodes of incapacity, information sufficient to establish the medical necessity for such intermittent or reduced schedule leave and an estimate of the frequency and duration of the episodes of incapacity; and

(8) If an employee requests leave on an intermittent or reduced schedule basis to care for a covered family member with a serious health condition, a statement that such leave is medically necessary to care for the family member, as described in 825.124 and 825.203(b), which can include assisting in the family member's recovery, and an estimate of the frequency and duration of the required leave.

(b) The Office of Congressional Workplace Rights has developed two optional forms (Form A and Form B) for use in obtaining medical certification, including second and third opinions, from health care providers that meets FMLA's certification requirements, as made applicable by the CAA. (*See* Forms A and B.) Optional Form A is for use when the employee's need for leave is due to the employee's own serious health condition. Optional Form B is for use when the employee needs leave to care for a family member with a serious health condition. These optional forms reflect certification requirements so as to permit the health care provider to furnish appropriate medical information. Forms A and B are modeled closely on Form WH–380E and Form WH–380F, as revised, which were developed by the Department of Labor (*See* 29 C.F.R. Part 825). The employing office may use the Office of Congressional Workplace Rights's forms, or Form WH–380E and Form WH–380F, as revised, or another form containing the same basic information; however, no information may be required beyond that specified in 825.306, 825.307, and 825.308. In all instances the information on the form must relate only to the serious health condition for which the current need for leave exists.

(c) If an employee is on FMLA leave running concurrently with a workers' compensation absence, and the provisions of the workers' compensation statute permit the employing office or the employing office's representative to request additional information from the employee's workers' compensation health care provider, the FMLA does not prevent the employing office from following the applicable workers' compensation provisions and information received under those provisions may be considered in determining the employee's entitlement to FMLA-protected leave. Similarly, an employing office may request additional information in accordance with a paid leave policy or disability plan that requires greater information to qualify for payments or benefits, provided that the employing office informs the employee that the additional information only needs to be provided in connection with receipt of such payments or benefits. Any information received pursuant to such policy or plan may be considered in determining the employee's entitlement to FMLA-protected leave. If the employee fails to provide the information required for receipt of such payments or benefits, such failure will not affect the employee's entitlement to take unpaid FMLA leave. *See* 825.207(a).

(d) If an employee's serious health condition may also be a disability within the meaning of the Americans with Disabilities Act (ADA), as amended and as made applicable by the CAA, the FMLA does not prevent the employing office from following the procedures for requesting medical information under the ADA. Any information received pursuant to these procedures may be considered in determining the employee's entitlement to FMLA-protected leave.

(e) While an employee may choose to comply with the certification requirement by providing the employing office with an authorization, release, or waiver allowing the employing office to communicate directly with the health care provider of the employee or his or her covered family member, the employee may not be required to provide such an authorization, release, or waiver. In all instances in which certification is requested, it is the employee's responsibility to provide the employing office with complete and sufficient certification and failure to do so may result in the denial of FMLA leave. *See* 825.305(d).

1825.307 Authentication and clarification of medical certification for leave taken because of an employee's own serious health condition or the serious health condition of a family member; second and third opinions.

(a) *Clarification and authentication.* If an employee submits a complete and sufficient certification signed by the health care provider, the employing office may not request additional information from the health care provider. However, the employing office may contact the health care provider for purposes of clarification and authentication of the medical certification (whether initial certification or recertification) after the employing office has given the employee an opportunity to cure any deficiencies as set forth in 825.305(c). To make such contact, the employing office must use a health care provider, a human resources professional, a leave administrator, or a management official. An employee's direct supervisor may not contact the employee's health care provider, unless the direct supervisor is also the only individual in the employing office designated to process FMLA requests and the direct supervisor receives specific authorization from the employee to contact the employee's health care provider. For purposes of these regulations, authentication means providing the health care provider with a copy of the certification and requesting verification that the information contained on the certification form was completed and/or authorized by the health care provider who signed the document; no additional medical information may be requested.

Clarification means contacting the health care provider to understand the handwriting on the medical certification or to understand the meaning of a response. Employing offices may not ask health care providers for additional information beyond that required by the certification form. The requirements of the Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule, (*See* 45 CFR parts 160 and 164), which governs the privacy of individually-identifiable health information created or held by HIPAA-covered entities, must be satisfied when individually-identifiable health information of an employee is shared with an employing office by a HIPAA-covered health care provider. If an employee chooses not to provide the employing office with authorization allowing the employing office to clarify the certification with the health care provider, and does not otherwise clarify the certification, the employing office may deny the taking of FMLA leave if the certification is unclear. *See* 825.305(d). It is the employee's responsibility to provide the employing office with a complete and sufficient certification and to clarify the certification if necessary.

(b) *Second Opinion.* (1) An employing office that has reason to doubt the validity of a medical certification may require the employee to obtain a second opinion at the employing office's expense. Pending receipt of the second (or third) medical opinion, the employee is provisionally entitled to the benefits of the FMLA, as made applicable by the CAA, including maintenance of group health benefits. If the certifications do not ultimately establish the employee's entitlement to FMLA leave, the leave shall not be designated as FMLA leave and may be treated as paid or unpaid leave under the employing office's established leave policies. In addition, the consequences set forth in 825.305(d) will apply if the employee or the employee's family member fails to authorize his or her health care provider to release all relevant medical information pertaining to the serious health condition at issue if requested by the health care provider designated to provide a second opinion in order to render a sufficient and complete second opinion.

(2) The employing office is permitted to designate the health care provider to furnish the second opinion, but the selected health care provider may not be employed on a regular basis by the employing office. The employing office may not regularly contract with or otherwise regularly utilize the services of the health care provider furnishing the second opinion unless the employing office is located in an area where access to health care is extremely limited (e.g., a rural area where no more than one or two doctors practice in the relevant specialty in the vicinity).

(c) *Third opinion.* If the opinions of the employee's and the employing office's designated health care providers differ, the employing office may require the employee to obtain certification from a third health care provider, again at the employing office's expense. This third opinion shall be final and binding. The third health care provider must be designated or approved jointly by the employing office and the employee. The employing office and the employee must each act in good faith to attempt to reach agreement on whom to select for the third opinion provider. If the employing office does not attempt in good faith to reach agreement, the employing office will be bound by the first certification. If the employee does not attempt in good faith to reach agreement, the

employee will be bound by the second certification. For example, an employee who refuses to agree to see a doctor in the specialty in question may be failing to act in good faith. On the other hand, an employing office that refuses to agree to any doctor on a list of specialists in the appropriate field provided by the employee and whom the employee has not previously consulted may be failing to act in good faith. In addition, the consequences set forth in 825.305(d) will apply if the employee or the employee's family member fails to authorize his or her health care provider to release all relevant medical information pertaining to the serious health condition at issue if requested by the health care provider designated to provide a third opinion in order to render a sufficient and complete third opinion.

(d) *Copies of opinions.* The employing office is required to provide the employee with a copy of the second and third medical opinions, where applicable, upon request by the employee. Requested copies are to be provided within five business days unless extenuating circumstances prevent such action.

(e) *Travel expenses.* If the employing office requires the employee to obtain either a second or third opinion the employing office must reimburse an employee or family member for any reasonable ''out of pocket'' travel expenses incurred to obtain the second and third medical opinions. The employing office may not require the employee or family member to travel outside normal commuting distance for purposes of obtaining the second or third medical opinions except in very unusual circumstances.

(f) *Medical certification abroad.* In circumstances in which the employee or a family member is visiting in another country, or a family member resides in another country, and a serious health condition develops, the employing office shall accept a medical certification as well as second and third opinions from a health care provider who practices in that country. Where a certification by a foreign health care provider is in a language other than English, the employee must provide the employing office with a written translation of the certification upon request.

825.308 Recertifications for leave taken because of an employee's own serious health condition or the serious health condition of a family member.

(a) *30-day rule.* An employing office may request recertification no more often than every 30 days and only in connection with an absence by the employee, unless paragraphs (b) or (c) of this section apply.

(b) *More than 30 days.* If the medical certification indicates that the minimum duration of the condition is more than 30 days, an employing office must wait until that minimum duration expires before requesting a recertification, unless paragraph (c) of this section applies. For example, if the medical certification states that an employee will be unable to work, whether continuously or on an intermittent basis, for 40 days, the employing office must wait 40 days before requesting a recertification. In all cases, an employing office may request a recertification of a medical condition every six months in connection with an absence by the employee. Accordingly, even if the medical certification indicates that the employee will need intermittent or reduced schedule leave for a period in excess of six months (e.g., for a lifetime condition), the employing office would be permitted to request recertification every six months in connection with an absence.

(c) *Less than 30 days.* An employing office may request recertification in less than 30 days if:

(1) The employee requests an extension of leave;

(2) Circumstances described by the previous certification have changed significantly (e.g., the duration or frequency of the absence, the nature or severity of the illness, complications). For example, if a medical certification stated that an employee would need leave for one to two days when the employee suffered a migraine headache and the employee's absences for his or her last two migraines lasted four days each, then the increased duration of absence might constitute a significant change in circumstances allowing the employing office to request a recertification in less than 30 days. Likewise, if an employee had a pattern of using unscheduled FMLA leave for migraines in conjunction with his or her scheduled days off, then the timing of the absences also might constitute a significant change in circumstances sufficient for an employing office to request a recertification more frequently than every 30 days; or

(3) The employing office receives information that casts doubt upon the employee's stated reason for the absence or the continuing validity of the certification. For example, if an employee is on FMLA leave for four weeks due to the employee's knee surgery, including recuperation, and the employee plays in company softball league games during the employee's third week of FMLA leave, such information might be sufficient to cast doubt upon the continuing validity of the certification allowing the employing office to request a recertification in less than 30 days.

(d) *Timing.* The employee must provide the requested recertification to the employing office within the time frame requested by the employing office (which must allow at least 15 calendar days after the employing office's request), unless it is not practicable under the particular circumstances to do so despite the employee's diligent, good faith efforts.

(e) *Content.* The employing office may ask for the same information when obtaining recertification as that permitted for the original certification as set forth in 825.306. The employee has the same obligations to participate and cooperate (including providing a complete and sufficient certification or adequate authorization to the health care provider) in the recertification process as in the initial certification process. *See* 825.305(d). As part of the information allowed to be obtained on recertification for leave taken because of a serious health condition, the employing office may provide the health care provider with a record of the employee's absence pattern and ask the health care provider if the serious health condition and need for leave is consistent with such a pattern.

(f) Any recertification requested by the employing office shall be at the employee's expense unless the employing office provides otherwise. No second or third opinion on recertification may be required.

825.309 Certification for leave taken because of a qualifying exigency.

(a) *Active Duty Orders.* The first time an employee requests leave because of a qualifying exigency arising out of the covered active duty or call to covered active duty status (or notification of an impending call or order to covered active duty) of a military member (*See* 825.126(a)), an employing office may require the employee to provide a copy of the military member's active duty orders or other documentation issued by the military which indicates that the military member is on covered active duty or call to covered active duty status, and the dates of the military member's covered active duty service. This information need only be provided to the employing office once. A copy of new active duty orders or other documentation issued by the military may be required by the employing office if the need for leave because of a qualifying exigency arises out of a different covered active duty or call to covered active duty status (or notification of an impending call or order to covered active duty) of the same or a different military member;

(b) *Required information.* An employing office may require that leave for any qualifying exigency specified in 825.126 be supported by a certification from the employee that sets forth the following information:

(1) A statement or description, signed by the employee, of appropriate facts regarding the qualifying exigency for which FMLA leave is requested. The facts must be sufficient to support the need for leave. Such facts should include information on the type of qualifying exigency for which leave is requested and any available written documentation which supports the request for leave; such documentation, for example, may include a copy of a meeting announcement for informational briefings sponsored by the military, a document confirming an appointment with a counselor or school official, or a copy of a bill for services for the handling of legal or financial affairs;

(2) The approximate date on which the qualifying exigency commenced or will commence;

(3) If an employee requests leave because of a qualifying exigency for a single, continuous period of time, the beginning and end dates for such absence;

(4) If an employee requests leave because of a qualifying exigency on an intermittent or reduced schedule basis, an estimate of the frequency and duration of the qualifying exigency;

(5) If the qualifying exigency involves meeting with a third party, appropriate contact information for the individual or entity with whom the employee is meeting (such as the name, title, organization, address, telephone number, fax number, and email address) and a brief description of the purpose of the meeting; and

(6) If the qualifying exigency involves Rest and Recuperation leave, a copy of the military member's Rest and Recuperation orders, or other documentation issued by the military which indicates that the military member has been granted Rest and Recuperation leave, and the dates of the military member's Rest and Recuperation leave.

(c) The Office of Congressional Workplace Rights has developed an optional form (Form E) for employees' use in obtaining a certification that meets FMLA's certification requirements. This optional form reflects certification requirements so as to permit the employee to furnish appropriate information to support his or her request for leave because of a qualifying exigency. Form E, or Form WH–384 (developed by the Department of Labor), or another form containing the same basic information, may be used by the employing office; however, no information may be required beyond that specified in this section.

(d) *Verification.* If an employee submits a complete and sufficient certification to support his or her request for leave because of a qualifying exigency, the employing office may not request additional information from the employee. However, if the qualifying exigency involves meeting with a third party, the employing office may contact the individual or entity with whom the employee is meeting for purposes of verifying a meeting or appointment schedule and the nature of the meeting between the employee and the specified individual or entity. The employee's permission is not required in order to

verify meetings or appointments with third parties, but no additional information may be requested by the employing office. An employing office also may contact an appropriate unit of the Department of Defense to request verification that a military member is on covered active duty or call to covered active duty status (or has been notified of an impending call or order to covered active duty); no additional information may be requested and the employee's permission is not required.

825.310 Certification for leave taken to care for a covered servicemember (military caregiver leave).

(a) *Required information from health care provider*. When leave is taken to care for a covered servicemember with a serious injury or illness, an employing office may require an employee to obtain a certification completed by an authorized health care provider of the covered servicemember. For purposes of leave taken to care for a covered servicemember, any one of the following health care providers may complete such a certification:

(1) A United States Department of Defense (''DOD'') health care provider;

(2) A United States Department of Veterans Affairs (''VA'') health care provider;

(3) A DOD TRICARE network authorized private health care provider;

(4) A DOD non-network TRICARE authorized private health care provider; or

(5) Any health care provider as defined in 825.125.

(b) If the authorized health care provider is unable to make certain military-related determinations outlined below, the authorized health care provider may rely on determinations from an authorized DOD representative (such as a DOD recovery care coordinator) or an authorized VA representative. An employing office may request that the health care provider provide the following information:

(1) The name, address, and appropriate contact information (telephone number, fax number, and/or email address) of the health care provider, the type of medical practice, the medical specialty, and whether the health care provider is one of the following:

(i) A DOD health care provider;

(ii) A VA health care provider;

(iii) A DOD TRICARE network authorized private health care provider;

(iv) A DOD non-network TRICARE authorized private health care provider; or

(v) A health care provider as defined in 825.125.

(2) Whether the covered servicemember's injury or illness was incurred in the line of duty on active duty or, if not, whether the covered servicemember's injury or illness existed before the beginning of the servicemember's active duty and was aggravated by service in the line of duty on active duty;

(3) The approximate date on which the serious injury or illness commenced, or was aggravated, and its probable duration;

(4) A statement or description of appropriate medical facts regarding the covered servicemember's health condition for which FMLA leave is requested. The medical facts must be sufficient to support the need for leave.

(i) In the case of a current member of the Armed Forces, such medical facts must include information on whether the injury or illness may render the covered servicemember medically unfit to perform the duties of the servicemember's office, grade, rank, or rating and whether the member is receiving medical treatment, recuperation, or therapy;

(ii) In the case of a covered veteran, such medical facts must include:

(A) Information on whether the veteran is receiving medical treatment, recuperation, or therapy for an injury or illness that is the continuation of an injury or illness that was incurred or aggravated when the covered veteran was a member of the Armed Forces and rendered the servicemember medically unfit to perform the duties of the servicemember's office, grade, rank, or rating; or

(B) Information on whether the veteran is receiving medical treatment, recuperation, or therapy for an injury or illness that is a physical or mental condition for which the covered veteran has received a U.S. Department of Veterans Affairs Service-Related Disability Rating (VASRD) of 50 percent or greater, and that such VASRD rating is based, in whole or in part, on the condition precipitating the need for military caregiver leave; or

(C) Information on whether the veteran is receiving medical treatment, recuperation, or therapy for an injury or illness that is a physical or mental condition that substantially impairs the covered veteran's ability to secure or follow a substantially gainful occupation by reason of a disability or disabilities related to military service, or would do so absent treatment; or

(D) Documentation of enrollment in the Department of Veterans Affairs Program of Comprehensive Assistance for Family Caregivers.

(5) Information sufficient to establish that the covered servicemember is in need of care, as described in 825.124, and whether the covered servicemember will need care for a single continuous period of time, including any time for treatment and recovery, and an estimate as to the beginning and ending dates for this period of time;

(6) If an employee requests leave on an intermittent or reduced schedule basis for planned medical treatment appointments for the covered servicemember, whether there is a medical necessity for the covered servicemember to have such periodic care and an estimate of the treatment schedule of such appointments;

(7) If an employee requests leave on an intermittent or reduced schedule basis to care for a covered servicemember other than for planned medical treatment (e.g., episodic flare-ups of a medical condition), whether there is a medical necessity for the covered servicemember to have such periodic care, which can include assisting in the covered servicemember's recovery, and an estimate of the frequency and duration of the periodic care.

(c) Required information from employee and/or covered servicemember. In addition to the information that may be requested under 825.310(b), an employing office may also request that such certification set forth the following information provided by an employee and/or covered servicemember:

(1) The name and address of the employing office of the employee requesting leave to care for a covered servicemember, the name of the employee requesting such leave, and the name of the covered servicemember for whom the employee is requesting leave to care;

(2) The relationship of the employee to the covered servicemember for whom the employee is requesting leave to care;

(3) Whether the covered servicemember is a current member of the Armed Forces, the National Guard or Reserves, and the covered servicemember's military branch, rank, and current unit assignment;

(4) Whether the covered servicemember is assigned to a military medical facility as an outpatient or to a unit established for the purpose of providing command and control of members of the Armed Forces receiving medical care as outpatients (such as a medical hold or warrior transition unit), and the name of the medical treatment facility or unit;

(5) Whether the covered servicemember is on the temporary disability retired list;

(6) Whether the covered servicemember is a veteran, the date of separation from military service, and whether the separation was other than dishonorable. The employing office may require the employee to provide documentation issued by the military which indicates that the covered servicemember is a veteran, the date of separation, and that the separation is other than dishonorable. Where an employing office requires such documentation, an employee may provide a copy of the veteran's Certificate of Release or Discharge from Active Duty issued by the U.S. Department of Defense (DD Form 214) or other proof of veteran status. *See* 825.127(c)(2).

(7) A description of the care to be provided to the covered servicemember and an estimate of the leave needed to provide the care.

(d) The Office of Congressional Workplace Rights has developed an optional form (Form F) for employees' use in obtaining certification that meets FMLA's certification requirements. This optional form reflects certification requirements so as to permit the employee to furnish appropriate information to support his or her request for leave to care for a covered servicemember with a serious injury or illness. Form F, or Form WH–385 (developed by the Department of Labor), or another form containing the same basic information, may be used by the employing office; however, no information may be required beyond that specified in this section. In all instances the information on the certification must relate only to the serious injury or illness for which the current need for leave exists. An employing office may seek authentication and/or clarification of the certification under 825.307. Second and third opinions under 825.307 are not permitted for leave to care for a covered servicemember when the certification has been completed by one of the types of healthcare providers identified in section 825.310(a)(1–4). However, second and third opinions under 825.307 are permitted when the certification has been completed by a health care provider as defined in 825.125 that is not one of the types identified in 825.310(a)(1)–(4). Additionally, recertifications under 825.308 are not permitted for leave to care for a covered servicemember. An employing office may require an employee to provide confirmation of covered family relationship to the seriously injured or ill servicemember pursuant to 825.122(k) of the FMLA.

(e) An employing office requiring an employee to submit a certification for leave to care for a covered servicemember must accept as sufficient certification, in lieu of the Office of Congressional Workplace Rights's optional certification form (Form F) or an employing office's own certification form, invitational travel orders (ITOs) or invitational travel authorizations (ITAs) issued to any family member to join an injured or ill servicemember at his or her bedside. An ITO or ITA is sufficient certification for the duration of time specified in the ITO or ITA. During that time period, an eligible employee may take leave to care for the covered servicemember in a continuous block of time or on an intermittent basis. An eligible employee who provides an ITO or ITA to support his or her request for leave may not be required to provide any additional or separate certification that leave taken on an intermittent basis during the period of time specified in the ITO or ITA is medically necessary. An ITO or ITA is sufficient certification for an employee entitled to take FMLA leave to care for a covered servicemember regardless of whether the employee is named in the order or authorization.

(1) If an employee will need leave to care for a covered servicemember beyond the expiration date specified in an ITO or ITA, an employing office may request that the employee have one of the authorized health care providers listed under 825.310(a) complete the Office of Congressional Workplace Rights optional certification form (Form F) or an employing office's own form, as requisite certification for the remainder of the employee's necessary leave period.

(2) An employing office may seek authentication and clarification of the ITO or ITA under 825.307. An employing office may not utilize the second or third opinion process outlined in 825.307 or the recertification process under 825.308 during the period of time in which leave is supported by an ITO or ITA.

(3) An employing office may require an employee to provide confirmation of covered family relationship to the seriously injured or ill servicemember pursuant to 825.122(k) when an employee supports his or her request for FMLA leave with a copy of an ITO or ITA.

(f) An employing office requiring an employee to submit a certification for leave to care for a covered servicemember must accept as sufficient certification of the servicemember's serious injury or illness documentation indicating the servicemember's enrollment in the Department of Veterans Affairs Program of Comprehensive Assistance for Family Caregivers. Such documentation is sufficient certification of the servicemember's serious injury or illness to support the employee's request for military caregiver leave regardless of whether the employee is the named caregiver in the enrollment documentation.

(1) An employing office may seek authentication and clarification of the documentation indicating the servicemember's enrollment in the Department of Veterans Affairs Program of Comprehensive Assistance for Family Caregivers under 825.307. An employing office may not utilize the second or third opinion process outlined in 825.307 or the recertification process under 825.308 when the servicemember's serious injury or illness is shown by documentation of enrollment in this program.

(2) An employing office may require an employee to provide confirmation of covered family relationship to the seriously injured or ill servicemember pursuant to 825.122(k) when an employee supports his or her request for FMLA leave with a copy of such enrollment documentation. An employing office may also require an employee to provide documentation, such as a veteran's Form DD–214, showing that the discharge was other than dishonorable and the date of the veteran's discharge.

(g) Where medical certification is requested by an employing office, an employee may not be held liable for administrative delays in the issuance of military documents, despite the employee's diligent, good-faith efforts to obtain such documents. *See* 825.305(b). In all instances in which certification is requested, it is the employee's responsibility to provide the employing office with complete and sufficient certification and failure to do so may result in the denial of FMLA leave. *See* 825.305(d).

825.311 Intent to return to work.

(a) An employing office may require an employee on FMLA leave to report periodically on the employee's status and intent to return to work. The employing office's policy regarding such reports may not be discriminatory and must take into account all of the relevant facts and circumstances related to the individual employee's leave situation.

(b) If an employee gives unequivocal notice of intent not to return to work, the employing office's obligations under FMLA, as made applicable by the CAA, to maintain health benefits (subject to COBRA requirements) and to restore the employee cease. However, these obligations continue if an employee indicates he or she may be unable to return to work but expresses a continuing desire to do so.

(c) It may be necessary for an employee to take more leave than originally anticipated. Conversely, an employee may discover after beginning leave that the circumstances have changed and the amount of leave originally anticipated is no longer necessary. An employee may not be required to take more FMLA leave than necessary to resolve the circumstance that precipitated the need for leave. In both of these situations, the employing office may require that the employee provide the employing office reasonable notice (i.e., within two business days) of the changed circumstances where foreseeable. The employing office may also obtain information on such changed circumstances through requested status reports.

825.312 Fitness-for-duty certification.

(a) As a condition of restoring an employee whose FMLA leave was occasioned by the employee's own serious health condition that made the employee unable to perform the employee's job, an employing office may have a uniformly-applied policy or practice that requires all similarly-situated employees (i.e., same occupation, same serious health condition) who take leave for such conditions to obtain and present certification from the employee's health care provider that the employee is able to resume work. The employee has the same obligations to participate and cooperate (including providing a complete and sufficient certification or providing sufficient authorization to the health care provider to provide the information directly to the employing office) in the fitness-for-duty certification process as in the initial certification process. *See* 825.305(d).

(b) An employing office may seek a fitness-for-duty certification only with regard to the particular health condition that caused the employee's need for FMLA leave. The certification from the employee's health care provider must certify that the employee is able to resume work. Additionally, an employing office may require that the certification specifically address the employee's ability to perform the essential functions of the employee's job. In order to require such a certification, an employing office must provide an employee with a list of the essential functions of the employee's job no later than with the designation notice required by 825.300(d), and must indicate in the designation notice that the certification must address the employee's ability to perform those essential functions. If the employing office satisfies these requirements, the employee's health care provider must certify that the employee can perform the identified essential functions of his or her job. Following the procedures set forth in 825.307(a), the employing office may contact the employee's health care provider for purposes of clarifying and authenticating the fitness-for-duty certification. Clarification may be requested only for the serious health condition for which FMLA leave was taken. The employing office may not delay the employee's return to work while contact with the health care provider is being made. No second or third opinions on a fitness-for-duty certification may be required.

(c) The cost of the certification shall be borne by the employee, and the employee is not entitled to be paid for the time or travel costs spent in acquiring the certification.

(d) The designation notice required in 825.300(d) shall advise the employee if the employing office will require a fitness-for-duty certification to return to work and whether that fitness-for-duty certification must address the employee's ability to perform the essential functions of the employee's job.

(e) An employing office may delay restoration to employment until an employee submits a required fitness-for-duty certification unless the employing office has failed to provide the notice required in paragraph (d) of this section. If an employing office provides the notice required, an employee who does not provide a fitness-for-duty certification or request additional FMLA leave is no longer entitled to reinstatement under the FMLA. *See* 825.313(d).

(f) An employing office is not entitled to a certification of fitness to return to duty for each absence taken on an intermittent or reduced leave schedule. However, an employing office is entitled to a certification of fitness to return to duty for such absences up to once every 30 days if reasonable safety concerns exist regarding the employee's ability to perform his or her duties, based on the serious health condition for which the employee took such leave. If an employing office chooses to require a fitness-for-duty certification under such circumstances, the employing office shall inform the employee at the same time it issues the designation notice that for each subsequent instance of intermittent or reduced schedule leave, the employee will be required to submit a fitness-for-duty certification unless one has already been submitted within the past 30 days. Alternatively, an employing office can set a different interval for requiring a fitness-for-duty certification as long as it does not exceed once every 30 days and as long as the employing office advises the employee of the requirement in advance of the employee taking the intermittent or reduced schedule leave. The employing office may not terminate the employment of the employee while awaiting such a certification of fitness to return to duty for an intermittent or reduced schedule leave absence. Reasonable safety concerns means a reasonable belief of significant risk of harm to the individual employee or others. In determining whether reasonable safety concerns exist, an employing office should consider the nature and severity of the potential harm and the likelihood that potential harm will occur.

(g) If the terms of a collective bargaining agreement govern an employee's return to work, those provisions shall be applied.

(h) Requirements under the Americans with Disabilities Act (ADA), as amended and as made applicable by the CAA, apply. After an employee returns from FMLA leave, the ADA requires any medical examination at an employing office's expense by the employing office's health care provider be job-related and consistent with business necessity. For example, an attorney could not be required to submit to a medical examination or inquiry just because her leg had been amputated. The essential functions of an attorney's job do not require use of both legs; therefore such an inquiry would not be job related. An employing office may require a warehouse laborer, whose back impairment affects the ability to lift, to be examined by an orthopedist, but may not require this employee to submit to an HIV test where the test is not related to either the essential functions of his or her job or to his/her impairment. If an employee's serious health condition may also be a disability within the meaning of the ADA, as made applicable by the CAA, the FMLA does not prevent the employing office from following the procedures for requesting medical information under the ADA.

825.313 Failure to provide certification.

(a) *Foreseeable leave.* In the case of foreseeable leave, if an employee fails to provide certification in a timely manner as required by 825.305, then an employing office may deny FMLA coverage until the required certification is provided. For example, if an employee has 15 days to provide a certification and does not provide the certification for 45 days without sufficient reason for the delay, the employing office can deny FMLA protections for the 30-day period following the expiration of the 15-day time period, if the employee takes leave during such period.

(b) *Unforeseeable leave.* In the case of unforeseeable leave, an employing office may deny FMLA coverage for the requested leave if the employee fails to provide a certification within 15 calendar days from receipt of the request for certification unless not practicable due to extenuating circumstances. For example, in the case of a medical emergency, it may not be practicable for an employee to provide the required certification within 15 calendar days. Absent such extenuating circumstances, if the employee fails to timely return the certification, the employing office can deny FMLA protections for the leave following the expiration of the 15-day time period until a sufficient certification is provided. If the employee never produces the certification, the leave is not FMLA leave.

(c) *Recertification.* An employee must provide recertification within the time requested by the employing office (which must allow at least 15 calendar days after the request) or as soon as practicable under the particular facts and circumstances. If an employee fails to provide a recertification within a reasonable time under the particular facts and circumstances, then the employing office may deny continuation of the FMLA leave protections until the employee produces a sufficient recertification. If the employee never produces the recertification, the leave is not FMLA leave. Recertification does not apply to leave taken for a qualifying exigency or to care for a covered servicemember.

(d) *Fitness-for-duty certification.* When requested by the employing office pursuant to a uniformly applied policy for similarly-situated employees, the employee must provide medical certification, at the time the employee seeks reinstatement at the end of FMLA leave taken for the employee's serious health condition, that the employee is fit for duty and able to return to work (*see* 825.312(a)) if the employing office has provided the required notice (see 825.300(e)); the employing office may delay restoration until the certification is provided. Unless the employee provides either a fitness-for-duty certification or a new medical certification for a serious health condition at the time FMLA leave is concluded, the employee may be terminated. *See also* 825.213(a)(3).

SUBPART D—ADMINISTRATIVE PROCESS

825.400 Administrative process, general rules.

(a) The Procedural Rules of the Office of Congressional Workplace Rights set forth the procedures that apply to the administrative process for considering and resolving alleged violations of the laws made applicable by the CAA, including the FMLA. The Rules include procedures for filing claims and participating in administrative dispute resolution proceedings at the Office of Congressional Workplace Rights, including procedures for the conduct of hearings and for appeals to the Board of Directors. The Procedural Rules also address other matters of general applicability to the dispute resolution process and to the operations of the Office.

(b) If an employing office has violated one or more provisions of FMLA, as incorporated by the CAA, and if justified by the facts of a particular case, an employee may receive one or more of the following: wages, employment benefits, or other compensation denied or lost to such employee by reason of the violation; or, where no such tangible loss has occurred, such as when FMLA leave was unlawfully denied, any actual monetary loss sustained by the employee as a direct result of the violation, such as the cost of providing care, up to a sum equal to 26 weeks of wages for the employee in a case involving leave to care for a covered servicemember or 12 weeks of wages for the employee in a case involving leave for any other FMLA qualifying reason. In addition, the employee may be entitled to interest on such sum, calculated at the prevailing rate. An amount equaling the preceding sums may also be awarded as liquidated damages unless such amount is reduced by the hearing officer or the Board because the violation was in good faith and the employing office had reasonable grounds for believing the employer had not violated the CAA. When appropriate, the employee may also obtain appropriate equitable relief, such as employment, reinstatement and promotion. When the employing office is found in violation, the employee may recover a reasonable attorney's fee, reasonable expert witness fees, and other costs as would be appropriate if awarded under section 2000e–5(k) of title 42.

(c) The Procedural Rules of the Office of Congressional Workplace Rights are found at 165 Cong. Rec. H4896 (daily ed. June 19, 2019) and 165 Cong. Rec. S4105 (daily ed. June 19, 2019), and may also be found on the Office's website at www.ocwr.gov.

825.401–825.404 [Reserved]

SUBPART E—[Reserved]

SUBPART F—SPECIAL RULES APPLICABLE TO EMPLOYEES OF SCHOOLS

825.600 Special rules for school employees, definitions.

(a) Certain special rules apply to employees of local educational agencies, including public school boards and elementary schools under their jurisdiction, and private elementary and secondary schools. The special rules do not apply to other kinds of educational institutions, such as colleges and universities, trade schools, and preschools.

(b) Educational institutions are covered by FMLA, as made applicable by the CAA (and these special rules). The usual requirements for employees to be eligible do apply.

(c) The special rules affect the taking of intermittent leave or leave on a reduced leave schedule, or leave near the end of an academic term (semester), by instructional employees. Instructional employees are those whose principal function is to teach and instruct students in a class, a small group, or an individual setting. This term includes not only teachers, but also athletic coaches, driving instructors, and special education assistants such as signers for the hearing impaired. It does not include, and the special rules do not apply to, teacher assistants or aides who do not have as their principal job actual teaching or instructing, nor does it include auxiliary personnel such as counselors, psychologists, or curriculum specialists. It also does not include cafeteria workers, maintenance workers, or bus drivers.

(d) Special rules which apply to restoration to an equivalent position apply to all employees of local educational agencies.

825.601 Special rules for school employees, limitations on intermittent leave.

(a) Leave taken for a period that ends with the school year and begins the next semester is leave taken consecutively rather than intermittently. The period during the summer vacation when the employee would not have been required to report for duty is not counted against the employee's FMLA leave entitlement. An instructional employee who is on FMLA leave at the end of the school year must be provided with any benefits over the summer vacation that employees would normally receive if they had been working at the end of the school year.

(1) If an eligible instructional employee needs intermittent leave or leave on a reduced leave schedule to care for a family member with a serious health condition, to care for a covered servicemember, or for the employee's own serious health condition, which is foreseeable based on planned medical treatment, and the employee would be on leave for more than 20 percent of the total number of working days over the period the leave would extend, the employing office may require the employee to choose either to:

(i) Take leave for a period or periods of a particular duration, not greater than the duration of the planned treatment; or

(ii) Transfer temporarily to an available alternative position for which the employee is qualified, which has equivalent pay and benefits and which better accommodates recurring periods of leave than does the employee's regular position.

(2) These rules apply only to a leave involving more than 20 percent of the working days during the period over which the leave extends. For example, if an instructional employee who normally works five days each week needs to take two days of FMLA leave per week over a period of several weeks, the special rules would apply. Employees taking leave which constitutes 20 percent or less of the working days during the leave period would not be subject to transfer to an alternative position. Periods of a particular duration means a block, or blocks, of time beginning no earlier than the first day for which leave is needed and ending no later than the last day on which leave is needed, and may include one uninterrupted period of leave.

(b) If an instructional employee does not give required notice of foreseeable FMLA leave (*See* 825.302) to be taken intermittently or on a reduced leave schedule, the employing office may require the employee to take leave of a particular duration, or to transfer temporarily to an alternative position. Alternatively, the employing office may require the employee to delay the taking of leave until the notice provision is met.

825.602 Special rules for school employees, limitations on leave near the end of an academic term.

(a) There are also different rules for instructional employees who begin leave more than five weeks before the end of a term, less than five weeks before the end of a term, and less than three weeks before the end of a term. Regular rules apply except in circumstances when:

(1) An instructional employee begins leave more than five weeks before the end of a term. The employing office may require the employee to continue taking leave until the end of the term if—

(i) The leave will last at least three weeks, and

(ii) The employee would return to work during the three-week period before the end of the term.

(2) The employee begins leave during the five-week period before the end of a term because of the birth of a son or daughter; the placement of a son or daughter for adoption or foster care; to care for a spouse, son, daughter, or parent with a serious health condition; or to care for a covered servicemember. The employing office may require the employee to continue taking leave until the end of the term if—

(i) The leave will last more than two weeks, and

(ii) The employee would return to work during the two-week period before the end of the term.

(3) The employee begins leave during the three-week period before the end of a term because of the birth of a son or daughter; the placement of a son or daughter for adoption or foster care; to care for a spouse, son, daughter, or parent with a serious health condition; or to care for a covered servicemember. The employing office may require the employee to continue taking leave until the end of the term if the leave will last more than five working days.

(b) For purposes of these provisions, academic term means the school semester, which typically ends near the end of the calendar year and the end of spring each school year. In no case may a school have more than two academic terms or semesters each year for purposes of FMLA, as made applicable by the CAA. An example of leave falling within these provisions would be where an employee plans two weeks of leave to care for a family member which will begin three weeks before the end of the term. In that situation, the employing office could require the employee to stay out on leave until the end of the term.

825.603 Special rules for school employees, duration of FMLA leave.

(a) If an employee chooses to take leave for periods of a particular duration in the case of intermittent or reduced schedule leave, the entire period of leave taken will count as FMLA leave.

(b) In the case of an employee who is required to take leave until the end of an academic term, only the period of leave until the employee is ready and able to return to work shall be charged against the employee's FMLA leave entitlement. The employing office has the option not to require the employee to stay on leave until the end of the school term. Therefore, any additional leave required by the employing office to the end of the school term is not counted as FMLA leave; however, the employing office shall be required to maintain the employee's group health insurance and restore the employee to the same or equivalent job including other benefits at the conclusion of the leave.

825.604 Special rules for school employees, restoration to an equivalent position.

The determination of how an employee is to be restored to an equivalent position upon return from FMLA leave will be made on the basis of ''established school board policies and practices, private school policies and practices, and collective bargaining agreements.'' The ''established policies'' and collective bargaining agreements used as a basis for restoration must be in writing, must be made known to the employee prior to the taking of FMLA leave, and must clearly explain the employee's restoration rights upon return from leave. Any established policy which is used as the basis for restoration of an employee to an equivalent position must provide substantially the same protections as provided in the FMLA, as made applicable by the CAA, for reinstated employees. *See* 825.215. In other words, the policy or collective bargaining agreement must provide for restoration to an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment. For example, an employee may not be restored to a position requiring additional licensure or certification.

SUBPART G—EFFECT OF OTHER LAWS, EMPLOYING OFFICE PRACTICES, AND COLLECTIVE BARGAINING AGREEMENTS ON EMPLOYEE RIGHTS UNDER THE FMLA, AS MADE APPLICABLE BY THE CAA.

825.700 Interaction with employing office's policies.

(a) An employing office must observe any employment benefit program or plan that provides greater family or medical leave rights to employees than the rights established by the FMLA. Conversely, the rights established by the FMLA, as made applicable by the CAA, may not be diminished by any employment benefit program or plan. For example, a provision of a collective bargaining agreement (CBA) which provides for reinstatement to a position that is not equivalent because of seniority (e.g., provides lesser pay) is superseded by FMLA. If an employing office provides greater unpaid family leave rights than are afforded by FMLA, the employing office is not required to extend additional rights afforded by FMLA, such as maintenance of health benefits (other than through COBRA or 5 U.S.C. 8905a, whichever is applicable), to the additional leave period not covered by FMLA.

(b) Nothing in the FMLA, as made applicable by the CAA, prevents an employing office from amending existing leave and employee benefit programs, provided they comply with FMLA, as made applicable by the CAA. However, nothing in the FMLA, as made applicable by the CAA, is intended to discourage employing offices from adopting or retaining more generous leave policies.

825.701 [Reserved]

825.702 Interaction with anti-discrimination laws, as applied by section 201 of the CAA.

(a) Nothing in the FMLA modifies or affects any applicable law prohibiting discrimination on the basis of race, religion, color, national origin, sex, age, or disability (e.g., Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act and as made applicable by the CAA). FMLA's legislative history explains that FMLA is ''not intended to modify or affect the Rehabilitation Act of 1973, as amended, the regulations concerning employment which have been promulgated pursuant to that statute, or the Americans with Disabilities Act of 1990 [as amended] or the regulations issued under that act. Thus, the leave provisions of the [FMLA] are wholly distinct from the reasonable accommodation obligations of employers covered under the [ADA] . . . or the Federal government itself. The purpose of the FMLA, as applied by the CAA, is to make leave available to eligible employees and [employing offices] within its coverage, and not to limit already existing rights and protection.'' S. Rep. No. 3, 103d Cong., 1st Sess. 38 (1993). An employing office must therefore provide leave under whichever statutory provision provides the greater rights to employees. When an employer violates both FMLA and a discrimination law, an employee may be able to recover under either or both statutes (double relief may not be awarded for the same loss; when remedies coincide a claimant may be allowed to utilize whichever avenue of relief is desired. *Laffey v. Northwest Airlines, Inc.*, 567 F.2d 429, 445 (D.C. Cir. 1976), *cert. denied*, 434 U.S. 1086 (1978).

(b) If an employee is a qualified individual with a disability within the meaning of the Americans with Disabilities Act (ADA), as made applicable by the CAA, the employing office must make reasonable accommodations, etc., barring undue hardship, in accordance with the ADA. At the same time, the employing office must afford an employee his or her FMLA rights, as made applicable by the CAA. ''ADA's disability'' and FMLA's ''serious health condition'' are different concepts, and must be analyzed separately. FMLA entitles eligible employees to 12 weeks of leave in any 12-month period due to their own serious health condition, whereas the ADA allows an indeterminate amount of leave, barring undue hardship, as a reasonable accommodation. FMLA requires employing offices to maintain employees' group health plan coverage during FMLA leave on the same conditions as coverage would have been provided if the employee had been continuously employed during the leave period, whereas ADA does not require maintenance of health insurance unless other employees receive health insurance during leave under the same circumstances.

(c)(1) A reasonable accommodation under the ADA might be accomplished by providing an individual with a disability with a part-time job with no health benefits, assuming the employing office did not ordinarily provide health insurance for part-time employees. However, FMLA would permit an employee to work a reduced leave schedule until the equivalent of 12 workweeks of leave were used, with group health benefits maintained during this period. FMLA permits an employing office to temporarily transfer an employee who is taking leave intermittently or on a reduced leave schedule to an alternative position, whereas the ADA allows an accommodation of reassignment to an equivalent, vacant position only if the employee cannot perform the essential functions of the employee's present position and an accommodation is not possible in the employee's present position, or an accommodation in the employee's present position would cause an undue hardship. The examples in the following paragraphs of this section demonstrate how the two laws would interact with respect to a qualified individual with a disability.

(2) A qualified individual with a disability who is also an eligible employee entitled to FMLA leave requests 10 weeks of medical leave as a reasonable accommodation, which the employing office grants because it is not an undue hardship. The employing office advises the employee that the 10 weeks of leave is also being designated as FMLA leave and will count towards the employee's FMLA leave entitlement. This designation does not prevent the parties from also treating the leave as a reasonable accommodation and reinstating the employee into the same job, as required by the ADA, rather than an equivalent position under FMLA, if that is the greater right available to the employee. At the same time, the employee would be entitled under FMLA to have the employing office maintain group health plan coverage during the leave, as that requirement provides the greater right to the employee.

(3) If the same employee needed to work part-time (a reduced leave schedule) after returning to his or her same job, the employee would still be entitled under FMLA to have group health plan coverage maintained for the remainder of the two-week equivalent of FMLA leave entitlement, notwithstanding an employing office policy that part-time employees do not receive health insurance. This employee would be entitled under the ADA to reasonable accommodations to enable the employee to perform the essential functions of the part-time position. In addition, because the employee is working a part-time schedule as a reasonable accommodation, the FMLA's provision for temporary assignment to a different alternative position would not apply. Once the employee has exhausted his or her remaining FMLA leave entitlement while working the reduced (part-time) schedule, if the employee is a

qualified individual with a disability, and if the employee is unable to return to the same full-time position at that time, the employee might continue to work part-time as a reasonable accommodation, barring undue hardship; the employee would then be entitled to only those employment benefits ordinarily provided by the employing office to part-time employees.

(4) At the end of the FMLA leave entitlement, an employing office is required under FMLA to reinstate the employee in the same or an equivalent position, with equivalent pay and benefits, to that which the employee held when leave commenced. The employing office's FMLA obligations would be satisfied if the employing office offered the employee an equivalent full-time position. If the employee were unable to perform the essential functions of that equivalent position even with reasonable accommodation, because of a disability, the ADA may require the employing office to make a reasonable accommodation at that time by allowing the employee to work part-time or by reassigning the employee to a vacant position, barring undue hardship.

(d)(1) If FMLA entitles an employee to leave, an employing office may not, in lieu of FMLA leave entitlement, require an employee to take a job with a reasonable accommodation. However, ADA may require that an employing office offer an employee the opportunity to take such a position. An employing office may not change the essential functions of the job in order to deny FMLA leave. *See* 825.220(b).

(2) An employee may be on a workers' compensation absence due to an on-the-job injury or illness which also qualifies as a serious health condition under FMLA. The workers' compensation absence and FMLA leave may run concurrently (subject to proper notice and designation by the employing office). At some point the health care provider providing medical care pursuant to the workers' compensation injury may certify the employee is able to return to work in a light duty position. If the employing office offers such a position, the employee is permitted but not required to accept the position. *See* 825.220(d). As a result, the employee may no longer qualify for payments from the workers' compensation benefit plan, but the employee is entitled to continue on unpaid FMLA leave either until the employee is able to return to the same or equivalent job the employee left or until the 12-week FMLA leave entitlement is exhausted. *See* 825.207(e). If the employee returning from the workers' compensation injury is a qualified individual with a disability, he or she will have rights under the ADA, as made applicable by the CAA.

(e) If an employing office requires certifications of an employee's fitness for duty to return to work, as permitted by FMLA under a uniform policy, it must comply with the ADA requirement that a fitness for duty physical be job-related and consistent with business necessity.

(f) Under Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act, and as made applicable by the CAA, an employing office should provide the same benefits for women who are pregnant as the employing office provides to other employees with short-term disabilities. Because Title VII does not require employees to be employed for a certain period of time to be protected, an employee employed for less than 12 months by the employing office may not be denied maternity leave if the employing office normally provides short-term disability benefits to employees with the same tenure who are experiencing other short-term disabilities.

(g) Under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), 38 U.S.C. 4301, *et seq.*, veterans are entitled to receive all rights and benefits of employment that they would have obtained if they had been continuously employed. Therefore, under USERRA, a returning servicemember would be eligible for FMLA leave if the months and hours that he or she would have worked for the civilian employing office during the period of absence due to or necessitated by USERRA-covered service, combined with the months employed and the hours actually worked, meet the FMLA eligibility threshold of 12 months of employment and the hours of service requirement. *See* 825.110(b)(2)(i) and (c)(2) and 825.802(c).

(h) For further information on Federal antidiscrimination laws applied by section 201 of the CAA (2 U.S.C. 1311), including Title VII, the Rehabilitation Act, and the ADA, individuals are encouraged to contact the Office of Congressional Workplace Rights.

SUBPART H—[Reserved]

ORDERS FOR WEDNESDAY, DECEMBER 8, 2021

Mr. SCHUMER. Finally, Mr. President, I ask unanimous consent that when the Senate completes its business today, it adjourn until 10 a.m., Wednesday, December 8; that following the prayer and pledge, the morning hour be deemed expired, the Journal of proceedings be approved to date, and the time for the two leaders be reserved for their use later in the day and the Senate be in a period of morning business, with Senators permitted to speak therein for up to 10 minutes each; that the cloture motions filed during yesterday's session ripen at 11:30 a.m., and if cloture is invoked on the Rollins nomination, all postcloture time expire at 2:15; further, that if cloture is invoked on the Smith nomination, all postcloture time expire at 5:30 p.m.; finally, that if any of the nominations are confirmed during Wednesday's session, the motions to reconsider be considered made and laid upon the table and the President be immediately notified of the Senate's actions.

The PRESIDING OFFICER. Without objection, it is so ordered.

ADJOURNMENT UNTIL 10 A.M. TOMORROW

Mr. SCHUMER. If there is no further business to come before the Senate, I ask unanimous consent that it stand adjourned under the previous order.

There being no objection, the Senate, at 10:19 p.m., adjourned until Wednesday, December 8, 2021, at 10 a.m.

NOMINATIONS

Executive nominations received by the Senate:

IN THE ARMY

THE FOLLOWING NAMED OFFICER FOR APPOINTMENT TO THE GRADE INDICATED IN THE UNITED STATES ARMY UNDER TITLE 10, U.S.C., SECTION 624:

To be major

TODD E. MOSZER

THE FOLLOWING NAMED OFFICER FOR APPOINTMENT TO THE GRADE INDICATED IN THE RESERVE OF THE ARMY UNDER TITLE 10, U.S.C., SECTION 12203:

To be colonel

LARRY J. SAUNDERS, JR.

IN THE SPACE FORCE

THE FOLLOWING NAMED OFFICERS FOR APPOINTMENT IN THE GRADE INDICATED IN THE REGULAR SPACE FORCE UNDER TITLE 10, U.S.C., SECTIONS 531 AND 716:

To be colonel

MARC D. DANIELS
JARED A. HOFFMAN
SCOTT B. JOSSELYN
LOUIS P. MELANCON
NICHOLAS MONTALTO III
JASON A. PARISH
MARCUS D. STARKS
JAY M. STEINGOLD

CONFIRMATIONS

Executive nominations confirmed by the Senate December 7, 2021:

NATIONAL MEDIATION BOARD

DEIRDRE HAMILTON, OF THE DISTRICT OF COLUMBIA, TO BE A MEMBER OF THE NATIONAL MEDIATION BOARD FOR A TERM EXPIRING JULY 1, 2022.

DEPARTMENT OF HOMELAND SECURITY

CHRIS MAGNUS, OF ARIZONA, TO BE COMMISSIONER OF U.S. CUSTOMS AND BORDER PROTECTION, DEPARTMENT OF HOMELAND SECURITY.

DEPARTMENT OF JUSTICE

CLARE E. CONNORS, OF HAWAII, TO BE UNITED STATES ATTORNEY FOR THE DISTRICT OF HAWAII FOR THE TERM OF FOUR YEARS.

ZACHARY A. CUNHA, OF RHODE ISLAND, TO BE UNITED STATES ATTORNEY FOR THE DISTRICT OF RHODE ISLAND FOR THE TERM OF FOUR YEARS.

NIKOLAS P. KEREST, OF VERMONT, TO BE UNITED STATES ATTORNEY FOR THE DISTRICT OF VERMONT FOR THE TERM OF FOUR YEARS.

DEPARTMENT OF HOMELAND SECURITY

ERIK ADRIAN HOOKS, OF NORTH CAROLINA, TO BE DEPUTY ADMINISTRATOR, FEDERAL EMERGENCY MANAGEMENT AGENCY, DEPARTMENT OF HOMELAND SECURITY.

POSTAL REGULATORY COMMISSION

MICHAEL KUBAYANDA, OF OHIO, TO BE A COMMISSIONER OF THE POSTAL REGULATORY COMMISSION FOR A TERM EXPIRING NOVEMBER 22, 2026.

FEDERAL COMMUNICATIONS COMMISSION

JESSICA ROSENWORCEL, OF CONNECTICUT, TO BE A MEMBER OF THE FEDERAL COMMUNICATIONS COMMISSION FOR A TERM OF FIVE YEARS FROM JULY 1, 2020.

DEPARTMENT OF JUSTICE

GREGORY K. HARRIS, OF ILLINOIS, TO BE UNITED STATES ATTORNEY FOR THE CENTRAL DISTRICT OF ILLINOIS FOR THE TERM OF FOUR YEARS.

PHILIP R. SELLINGER, OF NEW JERSEY, TO BE UNITED STATES ATTORNEY FOR THE DISTRICT OF NEW JERSEY FOR THE TERM OF FOUR YEARS.

BRANDON B. BROWN, OF LOUISIANA, TO BE UNITED STATES ATTORNEY FOR THE WESTERN DISTRICT OF LOUISIANA FOR THE TERM OF FOUR YEARS.

RONALD C. GATHE, JR., OF LOUISIANA, TO BE UNITED STATES ATTORNEY FOR THE MIDDLE DISTRICT OF LOUISIANA FOR THE TERM OF FOUR YEARS.

WITHDRAWAL

Executive Message transmitted by the President to the Senate on December 7, 2021 withdrawing from further Senate consideration the following nomination:

SAULE T. OMAROVA, OF NEW YORK, TO BE COMPTROLLER OF THE CURRENCY FOR A TERM OF FIVE YEARS, VICE JOSEPH OTTING, WHICH WAS SENT TO THE SENATE ON NOVEMBER 2, 2021.